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JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1883—No. 1083.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, JNO. T. FLINT, W. R. KELLUM, RICHARD COKE, ET AL.,

vs.

THOMAS M. SHIRLEY.

Appeal from Circuit Court of United States for the Northern District of Texas.

CAUSE ADVANCED BY APPELLEE UNDER 32d RULE

BRIEF FOR APPELLANTS.

JOHN G. WINTER,
Counsel for Appellants.

Brooks & Wallace Steam Print. Waco, Texas.

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ARGUMENT FOR APPELLANTS.

First.

The allegations of appellee's petition or complaint relative to his citizenship are not material. The petition of Coke *et al* for removal avers "That the controversy in said suit is between citizens of different states and that petitioners were, at the commencement of the suit against them, to-wit: on the 10th of November, A. D. 1881, and still are citizens of the State of Texas; and that the plaintiff herein (appellee) was then, and still is, a citizen of the State of New York. (Record p. 156.)"

No evidence was adduced in the court below, but the cause was remanded to the State Court as on demurrer to the sufficiency of the entire record. (Record p. 161.)

We respectfully submit: that the averments of appellee's petition as to citizenship are not material; that the allegations of the petition for removal control, unless *by evidence*, that jurisdictional *fact* is otherwise determined. The petition for removal is not based upon the ground of change of citizenship on the part of the plaintiff, subsequent to the institution of the suit, as is assumed in appellee's brief (p. 9); but upon the proposition that the suit, as to the appellants, Coke *et al.*, was instituted November 10, 1881, and that, at that time, the facts pleaded in the petition for removal existed. As to said appellants, the writ was made returnable to the District Court of McLennan County on the first Monday in May, 1882. (Rec. p. 144.) That was the first term as to them, and at that term the petition for removal was filed and granted. (Rec. p. 157.)

Second.

Relative to the second point made by appellee (Brief, p. 10), that appellants, Coke, Flint, Kellum, *et al.*, the petitioners for removal, are not such new parties as entitled them to remove the suit, and the rights and interests they represent, as trustees, do not entitle them to a removal of the case:

It appears from the statement of the case made by appellee (p. 2), "that after the institution of the suit, by an act of the Legislature of Texas, passed August 6th, 1870, the name of the defendant corporation"—that is, the *Waco Tap Railroad*—was changed to the *Waco, and North-western Railroad Company* (Rec., p. 11), and that by a subsequent act, approved May 24th, 1870, that company was merged into the *Houston and Texas Central Railway Company* (Rec., p. 37)—a corporation chartered by an act of the Legislature of Texas, approved March 11th, 1848. (Rec., p. 103.)

The statement of the case (p. 2) shows that the original suit against the Waco Tap Railroad Company, was instituted July 16th, 1870. August 6th, thereafter, the name of the Road was changed to the "Waco and North-western Railroad Com-

pany." Afterwards, by an act of the Legislature of Texas; approved May 24th, 1873, the said "Waco and Northwestern Railroad Company" was merged into the "Houston and Texas Central Railway Company. (Statement, p. 2.)

The validity of the merger was sustained by the Supreme Court of Texas in the case of the *Houston and Texas Central Railway Company vs. Shirley.* (54 Tex., p. 133.)

It is evident then, that on the 24th of May, 1873, the "Waco and North-western Railroad Company," which was the successor of the "Waco Tap Railroad," ceased to have corporate existence, and all property embraced in the deed of trust, made by said Waco and North-western Railroad, passed to the Houston and Texas Central Railway Company. (Record, p 51.)

The Waco Tap Railroad and the Waco and North-western Railroad, having thus ceased to exist, such property as it *then* possessed, and the control of its affairs generally, passed into the hands of the directors of such "sold out" Company under the provisions of Art. 4,916, Paschal's Dig., quoted by appellee in his Brief—p. 11—which is as follows:

"Whenever a sale of the road-bed, track, franchise and chartered powers and privileges, is made as hereinbefore provided (unless other persons shall have been appointed by the Legislature or by some Court of competent authority), the Directors or Managers of the "sold out" Comyany at the time of the sale, by whatever name they may be known at law, shall be trustees of the creditors and stock holders of the "sold out" company, and shall have full power to settle the affairs of the "sold out" company, collect and pay the outstanding debts, and divide among the stockholders the money and other property remaining in their hands after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such "sold out" company, and may be sued as such, and shall be *jointly*

and severally responsible to the creditors and stockholders of such company to the extent of the property and effects which shall come into their hands; and no suit pending for or against any railroad company at the time the sale may be made of its road-bed, track, franchise and chartered privileges shall abate, but the same shall be continued in the name of the trustees of the "sold out" company. (Paschal's Dig., 4916.)

The provisions of this statue regulating the continuance of pending suits against the "Waco and North-western Railroad," so far as it bears upon this case, was operative at the date of said Merger—May 24th, 1873, and the suit should have *then* been "continued *in the name* of the trustees of the "sold out" company." This continuance, we respectfully suggest, required *affirmative* action on the part of the appellee—that is, he should have suggested the names of such trustees, or otherwise have made them parties, and this, upon the most familiar principles relative to administrations, &c. The Waco Tap and the Waco and North-western Railroads having ceased to exist, no judgment could be rendered against either, and a decree against "the trustees" would lack essential difiniteness, for the prayer of appellee's petition asks a decree declaring said Coke *et al.* directors, and to establish as to them, and each of them, the most onerous *personal* liabilities. (Rec. p, 80-81.)

The record discloses no effort on the part of the appellee to reach the property they now seek to subject, until June 7th, 1878, four years after the merger, on which date he filed an amendment relative thereto, but which amendment, subsequently, on the 15th November, 1878, he formally withdrew, and "*no further relies on the same in this cause.*" (Rec. p. 54.)

No effort was made to bring the trustees into court until the filing of the suit now sought to be removed, November, 1881, eight years after the merger of the Waco and North-western into the Houston and Texas Central Railroad.

In the absence of any construction of the point in this statute here presented, we refer to the statutes of Texas, relative

to revivorship in other cases as illustrating the Legislative intent, there being no specific povisions in the statute quoted *supra.* We refer to Articles 1248, 1261, and 1215 of the Revised Statutes of Texas.

ARTICLE 1248.—"Where, in any suit, the defendant shall die before verdict, if the cause of action be one which survives, the suit shall not abate by reason of such death, but, upon a suggestion of such death being entered of record in open court, or upon a petition of the plaintiff representing that fact, being filed with the clerk, it shall be his duty to issue a *scire facias* for the executor or administrator, and, in a proper case, for the heir of such deceased defendant, requiring him to appear and defend the suit. And upon the return of such service, the suit shall proceed against such executor, administrator or heir, and such judgment may be rendered therein as may be authorized by law."

ARTICLE 1261.—"The*scire facias* and returns thereon, provided for in this chapter shall conform to the requisites of citations and the returns theron under the provisions of chapter 6 of this title."

ARTICLE 1215 (referred to in Article 1261, Supra).—"Such citation shall be directed to the Sheriff or any Constable of the county where the defendant is alleged to reside or be, and shall command him to summon the defendant to appear and answer the plaintiff's petition at the next regular term of the court, stating the time and place of holding the same. It shall state the date of the filing of plaintiff's petition, the file number of the suit, the names of all the parties and the nature of the plaintiff's demand, and shall contain the requisites prescribed in Article 1443."

(Article 1443 refers merely to *form* of process.)

Under these statutes, if, as we contend, they are held applicable to that quoted by appellees, appellants Coke *et al.*, to make them defendants, were entitled to *scire facias* and process as provided in the articles above noted.

This was not done until April 18, 1882, at which time, and *for the first time*, the appellants Coke *et al.*, *were cited, and were then so cited to answer a petition filed November 10, 1881.*

Without this citation, we submit, Coke *et al.* could not be made parties except by consent, and there was no consent.

The cause upon which the action was founded was subject to the bar of the Statute of Limitations of Texas of four years. (Rec. p. 17.)

ARTICLE 3256 (Revised Statutes of Texas) provides:— "There shall be commenced and *prosecuted*, within four years "after the cause of action shall have accrued, and not after- "wards, all actions or suits of the following description."

1.—"Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing."

Referring again to the proposition that appellants Coke *et al.* could, under the facts of this case, be made parties only by citation as suggested, we submit that the Statute of limitation had run as to them, at the date of the citations issued to them, April 18, 1882, because the right of action against them, if it ever in fact accrued, accrued at the date of the death of the Waco and Northwestern Railroad, May 24, 1873. The Statute had, of course, begun to run before the institution of the suit against the "Waco Tap," because the right of action accrued before that suit was begun, and said appellants Coke *et al.* never having been made parties under the Statutes quoted until April 18, 1882, at which time the petition under which they are now sought to be held liable was put in motion by citation, the fact that the original petition and the several amendments thereto were on file, did not stop the Statute as to them. On this point says the Supreme Court of Texas in Veremandi *vs.* Hutchins, 48 Tex. Rep. 531,—"Where a petition was filed and several years elapsed befora citations were issud, *limitation runs to the issuance of citation, and it is not stopped by the filing of the petition.*"

It seems then to be true, that appellants Coke *et al.* under the Texas Statutes quoted, were entitled, before becoming parties defendant, to the same formal process that is requisite

in the *institution* of a suit, and we submit that the defense of limitation accrued to them under the ruling in Veremandi *vs.* Hutchins *supra.* This established, it follows, that, as to them they are new parties and are entitled to remove the cause, (if not otherwise hindered) the appellee Shirley and said Coke *et al.* being at the time of the filing of such new suit, November, 1881, as far as the record discloses, citizens of different States. Shirley of New York and said appellants of Texas.

The laches of appellee in failing to make said appellants parties for the years intervening between the merger—May 20, 1873—statement p. 2—and the issuance of citation—April 18, 1882, Rec. p. 152—operated, we contend, as an abatement or abandonment as to them and this together with appellee's formal abandonment of this branch of the case, November 15, 1878 (Rec. p. 54), seems to be conclusive of our propositions that appellants Cope *et al.* became parties defendant for the first time, at the May term, 1882, of the District Court of McLennan county, at which term they filed their petitions for removal.

Third.

The third ground of exception is: "That the record does "not disclose any separate controversy between the plaintiff "(appellee) and the defendants (appellants) Flint, Kellum *et* "*al.*, and which can be fully determined as between them, "without the presence of the Houston and Texas Central Rail- "way Company, the other defendant in the suit, and that the "Railway Company is not entitled to a removal of the suit."

We submit, that the record discloses "a controversy which is wholly between citizens of different States (Shirley of New York and Coke, Kellum *et al.* of Texas) and which can be fully determined *as between them,*" without the presence of the Houston and Texas Central Railway Company. Appellee was a simple contract creditor, he had no lien of any character upon any property, except so far as he possessed an equitable

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A. M. SHIRLEY, CLERK

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No. 1083.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, JOHN T. FLINT, et al., Appellants,

vs.

THOMAS M. SHIRLEY.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Advanced for Argument under the 32d Rule of the Court.

BRIEF FOR APPELLEE.

J. HUBLEY ASHTON,
Of Counsel for Appellee.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1883.—No. 1083.

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vs.

THOMAS M. SHIRLEY.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This cause has been advanced for argument, under the 32d rule of the Court, on the motion of Appellee.

It is an appeal, under the provisions of the Act of March 3, 1875, chap. 137, from an order of the Court below, passed October 18, 1882, remanding a cause to the District Court for McLennan County, Texas, from whence it had been removed into the Circuit Court, for want of jurisdiction of that Court over the case, and upon the ground that the same had been improperly removed from the State Court. (Rec., pp. 161, 162.)

The case which was the subject of removal from the State Court to the Circuit Court, was a suit brought by *Thomas M. Shirley* (appellee here) against *The Waco Tap Railroad Company*, in the District Court for McLennan County, Texas, by a petition filed in that Court on July 16, 1870. (See Original Petition, Rec., pp. 89–97.)

The basis of that suit was a contract, made on July 29, 1869, between Shirley and the Waco Tap Railroad Company for the construction of the road of that company from Bremond to Waco, Texas.

The petition alleged a breach of the contract by the defendant Company, and prayed a judgment for the damages thereby sustained by the plaintiff, and that they might be adjudged a lien and encumbrance, or equitable mortgage, on the property of the Company, and that such lien be foreclosed by decree of the Court, &c. (Rec., p. 97, folio 107.)

The plaintiff averred, in his petition, that he was a citizen of Harris County and State of Texas, and that the defendant, The Waco Tap Railroad Company, was a corporation chartered by the State of Texas, having its principal office at Waco, McLennan County, in that State. (Rec., p. 89, folio 85.)

The controversy in this suit, therefore, was between two citizens of the State of Texas.

The defendant filed an answer to the petition November 25, 1870, and amended answers April 23 and 24, 1874. (Rec., p. 23.)

It appears that, after the institution of the suit, by an an Act of the Legislature of Texas, passed August 6, 1870, the name of the defendant corporation was changed to "*The Waco and Northwestern Railroad Company*," (Rec., p. 11,) and that by a subsequent Act, approved May 24, 1873, that Company was merged into the *Houston and Texas Central Railway Company*, (Rec., p. 37, folio 42,) a corporation chartered by an Act of the Legislature of Texas, approved March 11, 1848. (Ib., p. 103, fol. 103.)

It seems, by the record, that the petition of Shirley, filed, as above stated, on July 16, 1870, was amended at various times, and that the case, prior to the filing, on the 10th of November, 1881, of what is called the *amended original consolidated petition*, and prior to the filing of the petition for removal, was tried at least twice in the District Court for McLennan County, and twice carried to the Supreme Court of the State.

Judgment was rendered in favor of Shirley by the District Court on February 4, 1875, (Rec., pp. 125–128,) and again on November 25, 1878. (Ib., pp. 55, 56.)

By an amendment of the original petition, filed April 22, 1876, the *Houston and Central Texas Railway Company* was made a party defendant. (See this Amended Petition, Rec., p. 103.)

By that amendment, and other subsequent amendments, it was averred that the Houston and Texas Central Railway Company, after notice of plaintiffs' rights under his contract with the defendant, the Waco Tap Railroad Company, then known as the Waco and Northwestern Railroad Company, and of this suit, made a contract with that company to construct and complete its railroad from Bremond to Waco, and took from it a bond, payable January 1, 1873, for $600,000, secured by a deed of trust conveying to Gray and Botts, trustees, the road, road-bed, franchises, &c., of the Waco and Northwestern Railroad Company; that, by supplemental contract, the Houston and Texas Central Railway Company obtained control of the affairs of the Waco and Northwestern Railroad Company; that the road of that company was completed about 1872, but was in the possession of the Houston and Texas Central Company; that the latter Company, by means of its control of the directory of the Waco Company, wilfully prevented any effort on the part of that Company to pay the $600,000, or to prevent a default under the deed of trust; that the Waco Company having de-

faulted in the payment of its bond, a sale of its road, and other property described in the deed of trust, was made by Gray and Botts, trustees, in the month of February, 1873, and the trustees executed their deed of conveyance to the Houston and Texas Central Railway Company; that after this fraudulent sale, the Houston and Texas Central Railway Company procured the passage of the Act, above referred to, merging the Waco and Northwestern Railroad Company into the Houston and Texas Central Railway Company.

The amended petition averred that by virtue of said merger and consolidation, the Houston and Texas Central Railway Company was bound to pay the plaintiff, Shirley, all his claims, demands, and damages, the same as the Waco and Northwestern Railroad Company was bound and liable before said merger. (Rec., p. 16, fol. 17.)

Plaintiff accordingly prayed for judgment against that Company. (See Amendments, Rec., pp. 11–17.)

The Houston and Texas Central Railway Company, on May 4, 1876, filed a demurrer and answer to the petition. (Rec., p. 129.)

It filed other answers Dec. 29, 1877, and Jan'y 16, 1878. (Rec., pp. 130–141.)

It appears, by the record, that the plaintiff, Shirley, on June 7, 1878, consolidated his original petition and amendments, above referred to, against the Waco Tap Railroad Company and the Houston and Texas Central Railway Company. (Record, page 1 to page 22.)

The answers of the Waco Tap Railroad Company were consolidated and amended, (Rec., pp. 23–31,) and those of the Houston and Texas Central Railway Company were also consolidated and amended. (Ib., pp. 31–53.)

On November 25, 1878, plaintiff obtained a verdict for $8,509.41, due under his contract, $54,001.09 actual dam-

ages, and $37,500 exemplary damages, and judgment was accordingly rendered foreclosing the equitable mortgage on the railroad extending from Bremond to Waco, roadbed, right of way, &c., for the payment of the sum of $8,509.41; and for the other amounts found by the jury, a general judgment was entered against the Houston and Texas Central Railway Company. (Rec., p. 55.)

On November 10, 1881, after the reversal of that judgment, the plaintiff amended his consolidated petition (filed June 7, 1878,) making the directors of the "sold-out" Waco and Northwestern Railroad Company, at the time of the sale by Gray and Botts, trustees in the deed of trust, above mentioned, as *statutory trustees* of the creditors and stockholders of that Company, parties defendant in the suit. (Rec., p. 60.)

These parties were John T. Flint, W. R. Kellum, Richard Coke and others, appellants in this cause, (Rec., p. 80.)

This amendment averred that a large amount of property to which the Waco and Northwestern Company was entitled, was not included in the deed of trust to Gray and Botts as security for the Houston and Texas Central Railway Company, and was not conveyed to that Company by the trustees; that a subsequent transfer of that property by the directors of the "sold-out" Company to that corporation was without consideration and void; and that the same was a part of the assets and property of the Waco and Northwestern Railroad Company, and subject to the payment of the claims of creditors and stockholders of that Company, in the hands of the Houston and Texas Central Railway Company, and the claims of the plaintiff. (See the amended original consolidated petition. Rec., pp. 60–81.)

The directors of the "sold-out" Company were thus made parties, under the provision of the Statute of Texas,

hereinafter mentioned, which constitutes the directors of a "sold-out" Company, at the time of such sale, "*trustees of the creditors and stockholders*," and declares that any suit pending for or against any such Company, at the time the sale may be made of its road-bed, franchises, &c., shall not abate, but shall be continued in the name of the trustees of the sold-out Company. (Paschal's Digest, 4916.)

On May 20, 1882, these directors, trustees of the sold-out Company, filed a petition in the State Court, in the case of *Shirley* v. *Waco Tap Railroad Company*, for the removal of the suit into the Circuit Court, averring that "the controversy in said suit is between citizens of different States, and that the petitioners were, at the time of the commencement of this suit against them, *to wit, on the 10th day of November*, 1881, and still are, citizens of the State of Texas, and that the plaintiff herein, Thomas M. Shirley, was then, and still is, a citizen of the State of New York."

The Houston and Texas Central Railway Company united in this petition, which averred that the suit, as against that Company, was purely incidental and collateral to, and wholly depended upon, plaintiff's right to recover against its co-defendants, the trustees of said sold-out Company, the Waco and Northwestern Railroad Company. (See Petition for Removal, Rec., pp. 156, 157.)

On June 29, 1882, the State Court granted this petition, and the case was removed into the Court below. (Rec., p. 159.)

On October 6, 1882, the plaintiff, Thomas M. Shirley, filed in the Circuit Court a motion to remand the cause to the State Court, as follows:

T. M. Shirley
vs.
Waco Tap R. R. Co. et al. } No. —.

Now comes the plaintiff, T. M. Shirley, in the above-numbered and entitled cause, by his attorneys, and moves

the Court to remand this cause to the District Court for the County of McLennan, State of Texas, from whence this cause was removed into this Court on petition of defendants herein, alleging as a reason the citizenship of this plaintiff to be out of the State of Texas, filed in said Court May 20, 1882, and upon which petition this cause was removed into this Court, and is here now pending, because this Court has not jurisdiction to try and render final judgment in the same on the merits for reasons as follows:

First. This plaintiff was a *bona-fide* citizen of the State of Texas at the time of filing the original petition in this cause in said District Court for McLennan County, Texas, July, 1870, as is of record in this cause, and the allegation of said petition for removal of citizenship on November 10th, 1881, is not sufficient for the removal.

Second. The defendants herein, John T. Flint, W. R. Kellum, et al., the petitioners for removal, are not such new parties as they allege in said petition for removal as entitle them to the removal, nor does the rights and interests they represent as trustees, as appears of record in this cause, entitle them to the removal, because they were made parties at the said November term, 1881, of said State Court, as statutory trustees for the Waco Tap R. R. Company, the original defendants herein, and as to them and the rights and interests they represent there has been no change in the status of parties since the institution of this suit.

Third. The petition for removal does not, nor does the record of this cause, disclose any controversy in which there can be a final determination so far as concerns the defendants, John T. Flint, W. R. Kellum, et al., without the presence of the Houston and Texas Central Railway Company, the other defendants herein, and the said Houston and Texas Central Railway Company is not in any manner entitled to the removal.

And this plaintiff prays that this cause may be remanded to said District Court for McLennan County.

(Record, p. 160, 161.)

On October 18, 1882, the Court below passed an order granting the motion to remand, and remanding the cause to the District Court of McLennan County, Texas. (Rec., pp. 161–162.)

The defendants thereupon took an appeal from that order to this Court. (Rec., p. 162.)

Argument for Appellee.

First.

The first ground, or reason, assigned in the motion to remand, against the right of removal to the Circuit Court, is, that the plaintiff was a citizen of the State of Texas at the time of the filing of the original petition in the case in the State Court, viz., July 16, 1870, and the allegation in the petition for removal of plaintiff's citizenship in the State of New York on the 10th day of November, 1881, is not sufficient to authorize a removal of the cause.

The only allegation in the petition for removal, which is entitled in the suit of *Thomas Shirley* vs. *Waco Tap Railroad Company*, (No. 1779,) as to the citizenship of the plaintiff, Shirley, is, that he was, at the commencement of this suit against petitioners, *to wit, on the 10th day of November, A. D.* 1881, and still is, a citizen of the State of New York. (Record, p. 156.)

It is not averred that he was, at the commencement of *the suit* in which the petition is filed, a citizen of New York.

It appears, by the record, that the plaintiff, at the time of the commencement of the suit, by the filing of the original petition, on July 16, 1870, in the State Court, was a citizen of the State of Texas.

In that petition he averred that he was "a citizen of Harris County, and State of Texas." (Record, p. 89.)

On the 10th of November, 1881, he *amended* his *consolidated* petition filed June 7, 1878, and filed his amended original consolidated petition, (Record, p. 86, fol. 83,) making the petitioners, as trustees and late directors of the

Waco and Northwestern Railroad Company, defendants in the suit.

That petition shows upon its face a change of citizenship, on the part of the plaintiff, during the pendency of the suit in the State Court.

The averment, in the original petition, of plaintiff's citizenship in the State of Texas, is retained in the amended consolidated petition, (Record, p. 60, fol. 70,) and in the new allegations, referring to the directors of the sold-out company, at the time of the sale, of whom plaintiff was one, it is stated that he is "a citizen of the State and county of New York." (Record, p. 80, fol. 79.)

It is thus shown, by the amended consolidated petition, the allegations of which for the purposes of this motion must be taken to be true, that plaintiff changed his citizenship during the continuance of the cause in the State Court.

The petition for removal averring plaintiff's citizenship in New York, at the date of the filing of the amended consolidated petition, November 10, 1881, proceeds, therefore, upon the ground that such change of citizenship, on the part of plaintiff, subsequent to the institution of the suit, in the State Court, is sufficient warrant for the removal of the cause into the Federal Court.

That view is manifestly incorrect under the doctrines and decisions of this Court in the cases of *Morgan's Heirs* vs. *Morgan*, (2 Wh., 290,) *Kanouse* vs. *Martin*, (15 H, 198,) and *Clarke* vs. *Mathewson*, (12 Pet., 164,) and other cases.

In *Clark* v. *Mathewson* (supra) Mr. Justice Story said: "If, after the commencement of the suit, the *original plaintiff* had removed into, and became a citizen of, Rhode Island, the jurisdiction over the cause would not have been divested by such change of domicile. So it was held by this Court in *Morgan Heirs* v. *Morgan* (2 Wh., 290), *Mollan* v. *Torrance*, (9 Wh., 537), and *Dunn* v. *Clarke*, (8 Pet., 1.)"

By the same doctrine, the Circuit Court cannot acquire jurisdiction over a cause by a change of domicile and citizenship on the part of the plaintiff after the commencement of the suit in the State Court.

Second.

The second ground of objection to the right to remove the suit, stated in the motion to remand, is that the defendants John T. Flint, W. R. Kellum, *et al.*, the petitioners for removal, are not such new parties as entitle them to remove the suit, and that the rights and interests they represent, as trustees, do not entitle them to a removal of the case.

It appears, by the pleadings, that on or about February, 1873, P. W. Gray and B. A. Botts, trustees in the deed of trust to secure the Houston and Texas Central Railway Company, sold the property described therein, and that Company became the purchaser at the sale, and the trustees executed their deed of conveyance to the Central Railway Company. (Rec., p. 75.)

The deed of trust covered the road, road-bed, franchises, &c., of the Waco and Northwestern Railroad Company (Rec., p. 73), and, under the law of Texas, they were transferred to the purchaser, and the directors of the "sold-out" Company, at the time of the sale, became "trustees of the creditors and stockholders" of that Company, and any suit pending against the Company, at the time of the sale, was to be continued in the name of the trustees of the sold-out Company.

It would clearly seem, therefore, that, under the law of Texas, the directors of the Waco and Northwestern Company, at the time of the sale of its road and franchises, under the deed of trust, in February, 1873, became, upon the completion of the sale, and by operation of the Statute, and without any formal amendment of the petition, parties

defendant to this pending suit in their capacity as trustees of that Company.

If they ever had any right to remove the suit, which we deny, it was to be exercised at the term at which the cause could be first tried after the Act of 1875 went into operation. (Removal Cases, 100 U. S., 473; Myers *v.* Swann, 107 U. S., 547.)

But it is unnecessary to consider that question, for it is plain, we think, in view of the provisions of the Statute of Texas, and under the decisions of this Court, that the trustees defendants are not and never were entitled to remove the cause into the Federal Court.

They were formally made defendants under the following provision of the Statute of Texas:

"Whenever a sale of the road-bed, track, franchise, and chartered powers and privileges is made, as hereinbefore provided, (unless other persons shall be appointed by the Legislature, or by some Court of competent authority,) the directors or managers of the sold-out Company at the time of the sale, by whatever name they may be known at law, shall be the trustees of the creditors and stockholders of the sold-out Company, and shall have full power to settle the affairs of the sold-out Company, collect and pay the outstanding debts, and divide among the stockholders the money and other property remaining in their hands, after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out Company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of the property and effects which shall come into their hands; and no suit pending for or against any railroad company at the time the sale may be made of its road-bed, track, franchise, and chartered privileges shall abate, but the same shall be continued in the name of the trustees of the sold-out Company." (Paschal's Dig., 4916.)

The appellants were made defendants *pro forma*, principally, because the petition, as amended, sought the setting

aside of a sale of the assets of the sold-out Company while they were directors, which would place, if successful, a large amount of property in their hands to administer for the benefit of the creditors and stockholders of that Company.

Their relation to the suit was properly regarded by the Court below as merely incidental, arising from the necessity of preserving the means whereby the plaintiff might, if successful in his suit, obtain satisfaction of his claim against the sold out Company.

The controversy, in the suit, cannot, we submit, properly be said to be a controversy between the plaintiff and these directors of the sold-out Company, within the meaning of the Act of March 3, 1875.

In *Clarke v. Matthewson* (12 Pet., 164,) the Court held that a bill of revivor, by an executor, was, in no just sense, an original suit, but was a mere continuation of the original suit.

And upon the same principle the amended consolidated petition, in this case, as respects these appellants, is not to be treated, under the law of Texas, as an original suit against them, but is to be deemed a mere continuation of the original suit against the corporation.

The principle, also, of the decision in the recent case of *Bacon* v. *Rives* (106 U. S., 104) would appear to embrace the present case.

There it was held that where the executor of one of the defendants was a citizen of the same State as the plaintiff, and was made defendant not because of any connection with the main controversy in the suit, but to the end that the principal defendant's interest in the estate he represented might be reached and held subject to any decree the complainants might obtain against the defendant, the suit was nevertheless removable into the Circuit Court.

Mr. Justice Harlan said: "Though made formally de-

fendants, they occupied substantially the position of mere garnishees. *Their citizenship was consequently immaterial.*"

The present case is the converse of that, but both are governed, upon the question of removal, by the same general principle.

It is understood that the learned Circuit Judge who remanded this cause to the State Court, rested his opinion against the jurisdiction of the Federal Court mainly upon the proposition we have thus presented as founded upon the character and interests of the defendants under the Statute of the State of Texas above cited.

Third.

The third ground of exception to the order of the State Court removing the suit into the Circuit Court, presented in the motion to remand, is that the record does not disclose any separate controversy between the plaintiff and the defendants, Flint, Kellum, *et al.*, and which can be fully determined as between them, without the presence of the Houston and Texas Central Railway Company, the other defendant in the suit, and that the Railway Company is not entitled to a removal of the suit.

In *Fraser* v. *Jennison* (106 U. S., 194) the Chief Justice said:

"To entitle a party to removal under the 2d clause of the 2d section of the Act of 1875, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."

Upon the principle thus stated, there can be no lawful removal of this suit, we submit, unless there exists a controversy between the plaintiff and the statutory trustees of the sold-out Company, *as the petition has been filed*, which can be fully determined without the presence of the Houston and Texas Central Railway Company; for it must be conceded that that Company was not entitled to a removal at the time of the filing of the petition in the State Court by its co-defendants.

The Houston and Texas Central Railway Company was made a party defendant to this suit, as has been seen by amendments of the petition filed April 22, 1876, and December 28, 1877, in which its transactions with the original defendant are fully disclosed; and since it was brought into the case, it has been in fact the only real defendant, as the record shows.

The limitation of the act of 1875, as construed by this Court, long since barred any right of removal, if it ever had any, on the part of that corporation.

The only question, therefore, upon this branch of the discussion, is, whether there is in the suit any controversy between plaintiff and John T. Flint *et al.* as statutory trustees of the sold-out Company, wholly separable from that between him and the Houston and Texas Central Railway Co., and which can be fully determined without the presence of that Railway Company? And plainly there is not.

The petition discloses several controversies to which it is believed that the Railway Company is a necessary and indispensable party, and which cannot be determined without its presence:

1st. The action for damages against the original defendant is based upon a contract, which is charged to be an equitable lien on the road-bed, &c., of the Waco Tap Railroad Company for, at least, the money due for the

work done, and unpaid at the time the contract was broken, and also for a reserved ten per cent. on former monthly estimates; and the amended petition asks that the lien for plaintiff's debt, &c., on the road-bed, &c., be foreclosed; and that road-bed, &c., is in the possession and use of the Houston and Texas Central Railway Company, claiming a *bona-fide* title to the same, by virtue of the transactions to which reference has been made. (Petition, Rec., pp. 71, 80; Answer of H. & T. C. R. R. Co., Ib., pp. 132, 133.) That Railway Company, therefore, is an indispensable party to the proceeding for the foreclosure of the lien, or equitable mortgage, claimed by the petition.

2nd. The petition alleges that the land grants of the original defendant Company, conveyed to the Houston and Texas Central Railway Company, as above mentioned, are part of the assets of the Waco and Northwestern Railroad Company, and subject to the claims of the plaintiff, (Rec., pp. 75, fol. 77, 78,) and prays that the conveyance be declared null and void, and that the said land grants or certificates, now in the hands of the Houston and Texas Central Railway Company be decreed to be held by said directors as trustees, aforesaid, as the lands, assets and effects of the Waco and Northwestern Railway Company, in trust for the payment of plaintiff's claim, &c. (Rec., p. 80.)

To the controversy thus indicated, it would clearly appear, also, that the Houston and Texas Central Railway Company is a necessary and indispensable party, and that no full and final adjudication of the rights of the plaintiff in respect to that controversy can be had without the presence of that corporation.

It is respectfully submitted, therefore, that the third exception, in the motion to remand this suit to the State Court, to the jurisdiction of the Circuit Court over the cause, under the Act of March 3, 1875, was well taken by the Appellee.

Fourth.

We respectfully ask upon all the grounds above stated that the order of the Court below remanding the suit to the State Court from whence it came, be affirmed with costs.

J. Hubley Ashton,
Of Counsel for Appellee.

111-369-395

OFFICE SUPREME COURT U.S.
FILED
MAR 20 1884
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

The Board of Supervisors of the County of Santa Cruz,
Plaintiff in Error,

vs.

Santa Cruz Railroad Co.,
Defendant in Error.

Brief of Plaintiff in Error, on Motion to Dismiss Writ of Error.

S. O. HOUGHTON,
Counsel for Plaintiff in Error.

SENTINEL PRINT, SANTA CRUZ.

In the Supreme Court of the United States.

The Board of Supervisors of the County of Santa Cruz,
Plaintiff in Error,

vs.

Santa Cruz Railroad Co.,
Defendant in Error.

Brief of Plaintiff in Error, on Motion to Dismiss Writ of Error.

The ground of Federal jurisdiction relied upon by the plaintiff in error is that by the issuance of the bonds demanded in this proceeding, the State would deprive the taxpayers of the County of Santa Cruz of property without due process of law, contrary to the right, privilege or immunity secured by the First Section of the Fourteenth Amendment to the Constitution of the United States.

I.

The owners of property in that County would be deprived of their property by the issuance of the bonds in question.

They would constitute a lien upon all the property of the County, which could be enforced, notwithstanding the repeal of the Statute of the State authorizing a tax for their payment. This could be done by mandamus compelling such tax issued either from the State or Federal Courts.

Supervisors vs. United States, 4 Wall, 435;
Von Hoffman vs. City of Quincy, 4 Wall, 535.

These bonds would thus constitute an incumbrance prior and superior to any other lien, and of a privileged character, enforceable by the direct and immediate authority of the Courts. It needs no citation of authorities to support the position that such an incumbrance would deprive the citizen of his property to the extent of the proportion of the amount of the bonds issued to the taxable property of the County.

II.

The act of the Board of Supervisors in issuing the bonds of the County of Santa Cruz is the act of the State of California, by one of its subordinate agencies, vested with certain powers belonging to the State in its political capacity, and delegated by it to the various counties composing the State.

Dillon's Mun. Cor., Section 23.

The accompanying provision of the First Section of the Fourteenth Amendment, "nor shall any State deny to any "person within its jurisdiction the equal protection of the "laws," has been construed by this Court as extending to all the executive departments of the State Governments.

In *Neil vs. Delaware*, 103 U. S., 370, the State of Delaware, although neither its Constitution nor statutes authorized the exclusion of negroes from juries, was held to have deprived a negro defendant of the equal protection of the laws, because by the action of the authorities charged with

the summoning of the grand and trial juries in the Courts of that State, negroes were uniformly excluded from serving as jurors.

In *Ex parte Virginia*, 100 U. S., 339, this Court held that the selection of jurors was a ministerial and not a judicial act, and that the exclusion of negroes from the jury lists by the County Court Judge was a violation of the Fourteenth Amendment, as it denied to negroes the equal protection of the laws. In that case the Court says: "Whoever, by virtue of public position under a State Gov-"ernment, deprives another of property, life or liberty, "without due process of law, or denies or takes away the "equal protection of the laws, violates the Constitutional "inhibition."

100 U. S., 347.

That all the Departments of the State Government are included within the clause of the Fourteenth Amendment relied upon by the plaintiff in error is obvious, from the entirely different language of other restrictions upon the action of the States contained in the Federal Constitution. It declares that "No State shall pass any bill of attainer, or "*ex post facto* law, or law impairing the obligation of "contracts," and in the Fourteenth Amendment, that "No State shall make or enforce any law which shall "abridge the privileges or immunities of citizens of the "United States." These prohibitions, by their terms, relate to the legislative functions of the State Government, but the language following the last one in the same sentence, "Nor shall any State deprive any person, etc.," indicates clearly the intention to comprise within its meaning every mode of State action, by which any person might be deprived of life, liberty or property without due process of law, or by which any person might be denied the equal protection of the laws.

III.

Whether there had been at the commencement of this proceeding, "due process of law" under which the Board of Supervisors of the County of Santa Cruz had acquired the right to issue, and the defendant in error the right to demand from that Board the issuance of the bonds of the County, clearly constitutes a Federal question within the jurisdiction of this Court.

This mandamus proceeding is not the "due process of "law," intended by the Constitution. The right to the bonds in question must have existed as a perfect legal right before the institution of this proceeding, so that the duty of the Board of Supervisors was a purely ministerial one, specially enjoined by law as a duty resulting from their office. There must have been some process of law carried on by which the citizen had been deprived of his property, and which needed only the formal and ministerial act of issuing the bonds to accredit it and give it the effect already secured as a matter of right. In this instance the Subsidy Acts of 1870, and the proceedings under them, must have constituted such "due process of law," if any existed.

(1). The Subsidy Acts were entirely and unconditionally repealed on January 14, 1874.

Statutes of California, 1873–4, Page 26.

This was nearly two years and ten months before the defendant in error presented to the Board of Supervisors its demand for the bonds in question. There was then at the time of the demand no law in existence, no "process of "law," under which it could be claimed that the Board had any right to issue the bonds of the county.

The effect of the repeal was to destroy the Subsidy Acts as completely as if they had never existed, subject only to

the provision of the Federal Constitution against impairing the obligation of contracts by State laws.

Sedgwick Construction of Statute Law, 108.

Hampton vs. Commonwealth, 19 Pa. St., 329.

(2). The Subsidy Acts did not authorize any contract to be made by the Board of Supervisors antecedent to the issuance of the bonds.

Their provisions, which must be considered as the "due "process of law," by which the property of the citizen could be taken, were a submission to the qualified electors of the County at an election of the question whether railroad aid should be granted, after thirty days notice by publication once a week, in which notice, besides the time and place of election, *the route for which aid was proposed to be granted should be definitely described*, and the amount of bonds to be issued should be stated; and the vote in favor of such aid of a majority of the electors voting at such election. The vote being favorable, the Board of Supervisors were authorized to issue County bonds bearing a certain rate of interest and to provide by taxation for the payment of the interest and principal of said bonds, with the limitations, however, that "*No bonds should be issued by the Super-* "*visors of any County, in aid of the construction of a rail-* "*road, until at least five miles of such railroad should have* "*been constructed*, and then only in such an amount as the "distance of railroad constructed should bear to the whole "amount of aid to be granted, and that *at the time of the* "*issuance of such bonds* the amount of County indebted- "ness then outstanding and incurred should be deducted "from the amount of bonds authorized to be issued, and "that the whole amount of bonds should not exceed five "per cent. of the value of the taxable property of the "County according to its valuation on the assessment roll "*last preceding the time of the issue of said bonds.*"

An examination of these provisions in detail will show not only an entire silence as to the making of any contract, but that they are utterly inconsistent with such a theory. The bonds were intended to be a pure donation, the County received no stock of the railroad in return for them, and the offer of the donation could be withdrawn at any time before the right of any railroad company thereto had become absolute.

The power of the Board to issue the bonds arose only when five miles of the railroad had been constructed, and the limitations as to deducting the amount of County indebtedness, and the five per cent. of the taxable property of the County, *at the time when the bonds were issued*, clearly show that the Legislature did not intend to empower the Supervisors to make any contract precedent to the bonds.

If this is the only interpretation that can be placed upon the Subsidy Acts, the making of a contract by the Board of Supervisors did not constitute any part of the process of law provided for therein, and was an absolute nullity. It had no obligation whatever, and when those Acts were repealed the authority of the Board to issue subsidy bonds absolutely ceased, so far as any rights claimed by virtue of such pretended contract were concerned. That the Board of Supervisors, by an unauthorized and void proceeding, could destroy the right of the Legislature to repeal the Act under whose pretended authority it had been exercised, needs only to be stated to refute itself.

IV.

If the Board of Supervisors had the power to make any contract under the Subsidy Acts, the pretended contract relied upon by the defendant in error is of no force or effect whatever.

(1). It is not a contract, but a mere statement of the terms of a donation.

The case of *Town of Concord vs. Portsmouth Savings Bank*, 92 U. S., 630, is very similar to this one. In that case the proposition submitted to the voters was clear and definite, the railroad company to which the donation of the bonds was to be made was mentioned in the Act of the Legislature and determined by the vote of the township electors, and their vote ascertained the precise sum to be donated and the condition upon which it was to be granted. The railroad company filed in the office of the Town Clerk a written notice of the acceptance of the donation. Afterwards the Constitution of the State of Illinois prohibited such donations, as held in that case. The Court while declaring that a Constitution can no more impair the obligation of a contract than ordinary legislation can, held that no contract existed, and that "the town was not empowered to make the dona-" tion until the road was located and constructed through " the town. It had no authority to make a contract to " give, and the acceptance was an undertaking to do noth-" ing, which the company was not bound to do before the " authority of the town to make a donation, or to engage to " make a donation, came into existence. What is called " the acceptance of the railroad company cannot be con-" strued as an engagement to locate and build the railroad " through the town. It amounted to no more than saying: " 'If we build our road through your town we will receive " your gift.' There was, therefore, no consideration for the " town's promise to give, even if the popular vote can be " considered a promise. There was no contract to be im " paired. A contract should be clearly proved before it in " vokes the protection of the Federal Constitution."

In *Fairfield vs. County of Gallatin*, 100 U. S., 47, this Court modified its opinion in the case last cited, but only to

the extent that donations were within the meaning of the word "subscriptions," excepted from the effect of the Constitution of Illinois; and this ruling was made solely on the ground of a ruling of the Supreme Court of Illinois made previous to the case of Town of Concord vs. Portsmouth Savings Bank.

The reasoning of the Town of Concord case is directly opposite the case at bar. The pretended contract of August 4, 1873, is nothing more than the acceptance of a donation and a statement of its terms, and if it undertakes to do anything, is an undertaking to do nothing which the company was not bound to do before the authority of the Board of Supervisors, to make a donation or to engage to make a donation, came into existence. In this case as in that the Board of Supervisors had no authority to make a contract to give.

(2). The instrument of August 4, 1873, can only be considered as an executory contract, made upon conditions precedent. Such contracts require however mutuality of consideration to support them and are void unless such mutuality exists. If however the party who claims the benefit of the instrument, but has made no promise therein to perform the conditions precedent, (1) promise afterward to perform such conditions precedent, (2) or either perform the conditions, (3) or enter upon their performance in a way which binds him to complete them, *before the promise of the other party be withdrawn*, the contract in those cases is of legal obligation, and in no other, unless where an infant is a party to an agreement.

In this case the repeal of the Subsidy Acts revoked the authority of the Board of Supervisors to issue the bonds, and was an absolute withdrawal of the promise therefor made in the pretended contract. At that time, on January 14, 1874, the defendant in error had made no promise to

perform the conditions precedent, other than the contents of the pretended contract; it had not performed the conditions, as the first five miles of its railroad were not finished until December, 1874, and it had not entered upon their performance in a way which bound it to complete them. The defendant in error does not, in the pretended contract, bind itself in any manner to build the portion of the road from Santa Cruz to Pajaro Station mentioned therein.

That instrument was therefore a mere nullity for want of a consideration, and at the time of the repeal of the Subsidy Acts did not operate to create the obligation of a contract.

V.

The pretended contract was without validity or effect, because it related to only one-half of the route voted upon.

That route was about forty miles in length, about one-half of which lay to the southeast of Santa Cruz, extending from that town to Pajaro Station, on the Southern Pacific Railroad, and with this portion of the route alone does the pretended contract assume to deal. The other half of the route, about twenty miles in length, extending northwesterly from Santa Cruz to the northern line of the County of Santa Cruz, is totally unprovided for in that instrument.

It is evident that the most important of the provisions of the Subsidy Acts, constituting "due process of law," is the vote of the electors upon the question submitted to them. They required that it should "*definitely describe the route for "which*" the bonds were to be issued. In voting upon the question of granting this donation, the electors must have been influenced entirely by the consideration of the railroad route as a whole. The tax-payers owning property along the twenty miles of the route lying above Santa Cruz would not be likely to vote in favor of a heavy and lasting addition to the burden of taxation merely to benefit the property

owners residing along the twenty miles of the route lying below Santa Cruz. As an absolute and indisputable fact, no voter did vote for one-half of the route, the proposition contemplated the construction of a railroad over the entire route, and the tax-payer consented to encumber his property, to donate a certain portion of it, only in view of the benefits that might result from the existence of a railroad through the entire length of the County.

The provision that the route should be definitely described would be entirely purposeless, if the Board of Supervisors could disregard it and provide by a contract merely for the building of any five miles of the railroad, and utterly disregard the other portions of the route. *If that Board had any power to bind the County by a contract to donate bonds in the future, that power must have been exercised in conformity with the proposition submitted to and adopted by the people, and must have provided for and secured the building of the railroad over the entire route.* Otherwise the "due process of "law," from which their power solely arose, would be disregarded and nullified in its most essential particular. It is inconceivable that any citizen of the County of Santa Cruz, when voting upon the question submitted for his approval, supposed that he was vesting the Board of Supervisors with authority to bind the County by a contract to secure the building of any five miles of railroad upon the route voted upon and leave the remainder unprovided for.

Such a construction of the Subsidy Acts has no foundation; it first interpolates a power to make a contract to donate in advance of the construction of the railroad, as to which these Acts are entirely silent, and then interprets that power in such a mode as to render entirely void the express provision of the Acts, as to the meaning and purpose of which there can be but one logical conclusion. The vote of the electors was the "due process of law," from which the power of the Board arose, and the extent of that

power must be governed by the plain purpose and intention of such vote.

VI.

No vested right existed at the time of the repeal of the Subsidy Acts on January 14, 1874, by reason of the construction of the railroad, as no part of the railroad had then been built. The first five miles of the railroad were not completed until some time in December, 1874.

VII.

Every question involved in the construction of the Subsidy Acts and the repeal thereof, under the facts of this case, is one of the "due process of law," and therefore a question in which Federal jurisdiction exists, under the clause of the Fourteenth Amendment cited. The only questions are, first, whether any process of law whatever existed at the time the issuance of the bonds was demanded of the Board of Supervisors, under whose authority they could be issued, and second, whether the due process of law prescribed by those Acts had been pursued, so as to create a right to their issuance prior, in point of time and superior in point of law, to their repeal.

If such questions exist and were necessary to be passed upon in the decision of this case, and the decision made necessarily involved a determination of those questions adverse to the rights of the plaintiff in error existing under them, the Federal jurisdiction sufficiently appears, without its being specially pleaded.

In the case of *Bridge Proprietors vs. Hoboken Co.*, 1 Wallace, 142, this Court says: "It would be a new rule of "pleading, and one altogether superfluous, to require a "party to set out specially the provision of the Constitution "of the United States, on which he relies for the action of "the Court in the protection of his rights. If the Courts

" of this country, and especially this Court, can be sup-
" posed to take judicial notice of anything without pleading it
" specially. it is the Constitution of the United States. And
" if the plaintiff and defendant in their pleadings make a
" case which necessarily comes within some of the provis-
" ions of that instrument, this Court surely can recognize
" the fact without requiring the pleader to say in words:
" 'This paragraph of the Constitution is the one involved
" in this case.'"

To the same effect are the cases of *Suttgbe* vs. *Matherson*, 2 Peters, 380.

Craig vs. Missouri, 4 Peters 410, and
David vs. Packard, 6 Peters, 41.

The answer of defendant in this action, now the plaintiff in error, set up fully and distinctly every matter of fact upon which it was claimed that as a matter of law the citizen would be deprived of his property without due process of law by the pretended authority of the State.

The repeal of the Subsidy Acts, the non-existence of any contract between the County of Santa Cruz and the defendant in error, the want of any right, power or authority of the Board of Supervisors of that County to make or enter into the pretended contract of August 4, 1873, or at any time after the repeal of those Acts, to aid in the construction of any railroad, or to issue any bonds of the County to any railroad company, the submission by the Board of Supervisors and adoption by the vote of the electors of the County of a certain route, for which aid was to be granted and no other route; that the pretended contract related to and concerned less than one-half of the route so adopted, that no provision had ever been made for the other half of the route by the Board of Supervisors; all these matters were fully and explicitly pleaded.

The legal effect of each and all of them was that the Board of Supervisors never had any authority, right or power to issue any bonds and that their issuance would be without "due process of law."

Thus upon the face of the record a Federal question essentially and necessarily existed, and without the decision whereof against defendant, the judgment of this Court must have been in its favor.

All the cases cited by defendant in error are of a different character; no Federal question necessarily existed in any of those cases, and none was shown in any manner by averment in the pleadings or in other parts of the record before this Court.

VIII.

The brief opinion of the Supreme Court of California, dissented from by three of the Justices (62 Cal., page 250), shows that all these questions were passed upon by that Court and necessary to its decision. It is that the conditions precedent, upon which the defendant in error was entitled to have the bonds issued to it, had all been performed by it, before the commencement of this proceeding, and it cites the case of *Nevada Bank vs. Steinmetz*, decided eleven days before. The opinion of Chief Justice Morrison and the concurring opinions of Judges Sharpstein, Ross and McKinstry, and the dissenting opinion of Justices Myrick, McKee and Thornton, in the Nevada Bank case, are given in full in the brief of defendant in error on this motion.

The opinion of the Chief Justice in that case (see page 29 of Brief of Defendant in error), declares that the Subsidy Acts did not provide for a contract between the County and the Railroad Company, although it seems to treat the pretended contracts as good; the opinion of Justice Sharpstein seems to rest upon two grounds, the validity of the

pretended contract and the existence of an estoppel by reason of the payment of interest on the bonds held by the Nevada Bank, which opinion of Justice Sharpstein is concurred in by Judge McKinstry without reservation, and by Judge Ross upon the second ground, the alleged estoppel of the County. In this case, however, the opinion of the majority of the Court could not be based upon any question of estoppel, as the bonds had not yet been issued, and the claim for their issuance was made by the railroad corporation itself. There can, therefore, be no question as to the grounds of the decision in this action, and as to their involving all the propositions relied on by the defendant in error as of Federal jurisdiction.

In regard to the authority of the Nevada Bank case, it may be pertinent to remark that the present action for the issuance of additional bonds was commenced in February, 1877, and on appeal to the Supreme Court of California, a judgment in favor of the Board of Supervisors was rendered on December 23, 1880, in Department One of that Court, on the ground of the nullity of the pretended contract.

Thereupon the County Treasurer of the County of Santa Cruz declining to recognize the validity of the previously issued bonds in consequence of that decision, the Nevada Bank, their owner, procured an alternative writ of mandamus from the Supreme Court of California in January, 1881, to compel the payment of the interest on their bonds.

A petition for rehearing in bank was also granted after the decision of this case in Department One, as above mentioned, and the two cases were afterwards argued and submitted together.

In the Nevada Bank case a petition for rehearing and motion for a new trial having been denied, a writ of error to

the Supreme Court of the United States was granted and approved by Chief Justice Morrison, and the citation issued on January 23, 1884.

IX.

It is asserted by the defendant in error that no Federal question can exist in regard to a power claimed to be exercised under a State statute, if the validity of such statute be not attacked as repugnant to the Constitution, treaties or laws of the United States. This is equivalent to maintaining that the prohibition of the Fourteenth Amendment that "no State shall deprive any person of life, liberty or "property, without due process of law," extends only to the Legislature of a State and that its executive department is not affected thereby. But this position is in direct contradiction to the authority of the cases above cited of *Neal vs. Delaware* 103 U. S., 370, and *Ex parte Virginia* 100 U. S., 349, where the acts of the State by its subordinate executive officers were held to be in conflict with the Fourteenth Amendment, and where the validity of any statute as being in conflict with the Federal Constitution was in nowise involved. In the last of those cases, to repeal the former citation, the Court says: "Whoever by virtue of "public position under a State government deprives, etc., "violates the Constitution inhibition."

There can be no reason for the distinction attempted to be drawn: the evils inflicted in depriving the citizen of his property by virtue of executive public position are certainly as great when attempted as in this instance, in total disregard of the State laws and in defiance of their repeal, as if cloaked under the provisions of a statute not providing for any process of law whatever and plainly repugnant to the Constitution. While the plaintiff in error claims that the issuance of the bonds is not justified by any statute, and that

there exists no statute giving the Board of Supervisors any right to issue them, and that their issuance would therefore be without any authority and without process of law, the answer of the defendant in error is, we claim that the right exists by virtue of certain statutes, and as we have obtained a decision of the State Supreme Court to that effect, there is only a question of the construction of a State law and with that the Federal Courts have nothing to do. But this is merely a *petitio principii*; it assumes that the question of "due process of law" can be taken away from the Federal Courts to which it is given by the Federal Constitution, by the plea of a statute whose meaning and effect are absolutely in contradiction with the right claimed. By the easy machinery of setting up some law of the State as a pretended foundation for an exercise of power, the grossest and most oppressive attacks on the liberty and property of the citizen could be removed from the scope of Federal jurisdiction under the argument advanced by the defendant in error. However palpable the absurdity of such a pretence might be, however remote the power exercised might be from the words and meaning of the State law claimed to support it, the sufficient answer to Federal interference would be, the Federal Courts have nothing to do with the construction of State laws by the State Courts, and they have decided the power to exist under those laws. The opposite rule is clearly the correct one, that every mode of State action by which any person may be deprived of life, liberty or property without due process of law is within the meaning of the Fourteenth Amendment, whether instituted by the Legislature or the executive, and cannot be sheltered behind the shield of the construction of a State law forbidding such action by its plain and express terms.

X.

This argument has endeavored to present the leading features of the case at bar, but the discussion of the motion to dismiss within its limits plainly shows that the merits of the entire case are involved in such motion. In such cases, unless the motion to dismiss is based upon a clear and obvious lack of Federal jurisdiction, it is respectively submitted that the practice of this Court has uniformly been to deny the motion and permit the case to be argued in its course.

S. O. HOUGHTON,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ,

Plaintiff in Error.

vs.

SANTA CRUZ RAILROAD COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ON MOTION TO DISMISS WRIT OF ERROR.

EDWARD R. TAYLOR,

Counsel for Defendant in Error.

H. S. CROCKER & CO., PRINTERS, 121 SUTTER ST., S. F.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ,

Plaintiff in Error,

vs.

SANTA CRUZ RAILROAD COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

MOTION.

Defendant in Error has submitted herewith a motion of which the following is a copy:

"Comes now defendant in error by its counsel, Edward R. Taylor, Esq., and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction, in this, that it appears from the record in said cause, that no fed-

eral question is involved in said cause within the meaning of Section 709 of the Revised Statutes of the United States."

STATEMENT OF FACTS.

In support of this motion, the facts material thereto, as shown by the record, are as follows:

In 1870, the Legislature of the State of California enacted the following Statutes:

An Act to empower the Board of Supervisors of the several Counties of the State to aid in the construction of a Railroad in their respective Counties.

[Approved April 4, 1870.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The several counties, including the City and County of San Francisco, are hereby authorized to aid in the construction of railroads by the issue of county bonds bearing interest at the rate of not exceeding seven per cent. per annum, and payable within twenty years from the date of their issue, and to provide by taxation for the payment of the interest and principal of said bonds; *provided*, that the whole amount of said bonds herein authorized to be issued shall not exceed five per cent. of the value of the taxable property of such county, or city and county, according to its valuation on the assessment roll last preceding the time of the issue of said bonds.

SEC. 2. Before the granting of such aid, the Board of Supervisors of the county, or city and county, proposing to grant such railroad aid, shall submit to the qualified electors of said county, or city and county, at an election, of which election at least thirty days notice shall be given, by publication once a week in a newspaper published in said county, the question whether such railroad aid shall be granted, in which notice the day on which and the places where such election is to be held shall be stated; and the route for which aid is proposed to be granted shall be definitely described, and the amount of bonds to be issued shall be stated. All elections authorized under this Act shall be conducted in the same manner as elections for State and county officers. No aid to railroads shall be granted unless a majority of the electors voting at such election shall cast their votes in favor of such aid.

SEC. 3. This Act shall take effect and be in force from and after its passage.

An Act supplemental to an Act to empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties, approved April fourth, eighteen hundred and seventy.

[Approved April 4, 1870.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. No bonds shall be issued by the Supervisors of any county, in aid of the construction of a railroad, until at least five miles of such railroad shall have been constructed, and then only in such an amount as the distance of railroad constructed shall bear to the whole amount of aid to be granted; at the time of the issue of such bonds, the amount of county indebtedness then outstanding and incurred, by granting aid in the construction of railroads, shall be deducted from the amount of bonds authorized to be issued by the provisions of the Act to which this Act is supplemental.

SEC. 2. This Act shall take effect from and after its passage

Statutes of California 1869–70, pp. 744 and 746.

These Statutes were in force until the 14th of January, 1874, when they were repealed.

Statutes of California, 1873–74, p. 26.

Upon the 25th day of September, 1872, the Board of Supervisors of the County of Santa Cruz (plaintiff in error), in pursuance of the foregoing Acts, duly passed an order for the submission to a vote of the electors of said County, of the question of granting the aid of said County in the form of bonds to the amount of $6,000 a mile, to aid in the construction of a railroad through said County.

After due and regular publication of said submission, and of the time and places at which the same should be voted on, the electors of said County voted in favor of granting such railroad aid.

In pursuance of said vote, the Board of Supervisors, on behalf of the County, on the 4th day of August, 1873, entered into the following written contract with the Railroad Company:

This contract, made and entered into on the fourth day of August, A. D. 1873, by and between the County of Santa Cruz, in the State of California, acting by and through the Board of Supervisors of said County as the party of the first part, and that certain corporation, organized, acting and existing under and by virtue of the laws of said State, and known, designated and called the Santa Cruz Railroad Company, as the party of the second part:

Witnesseth, that the Board of Supervisors of said County, having by an Order duly made on September 25th, 1872, and recorded at large in Vol. 3, pages 236-7-8 of the minutes of the proceedings of said Board, proposed that said County shall aid in the construction of a Railroad of not less than a 3 foot gauge, the route of which road is definitely described in said proceedings, as beginning at or near the Pajaro Depot on the Southern Pacific Railroad, and thence running in the most practicably direct route through the Counties of Monterey and Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the County road leading to Soquel and the Bay of Monterey, and thence along or near the coast to the boundary of said County near the southeast corner of the Point New Years Rancho, by the issue of County Bonds, payable within twenty years, and bearing interest payable semi-annually at the rate of seven per cent. per annum, to the amount of Six Thousand Dollars per mile, but not exceeding in the aggregate, the sum of Two Hundred and Forty Thousand Dollars; such aid to be in lieu of the aid of One Hundred Thousand Dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad: And the Board of Supervisors of said County, under and in pursuance of an Act of the Legislature of said State, approved April 4, 1870, and entitled "An Act to empower the Board of Supervisors of the several Counties of the State to aid in the construction of a railroad in their respective Counties," and of the Act of April 4, A. D. 1870, supplemental thereto, having at the election held in said County on the 5th day of November, A. D. 1872, of which election, at least thirty days notice was given by publication once a week in a newspaper printed and published in said County, which notice stated the day on which, and the places where such election was to be held in said County, and the amount of Bonds of said County to be issued for railroad aid, and definately described the route of the railroad for which aid was proposed, submitted to the qualified electors of said County the question whether such railroad aid shall be granted by said County to aid in the construction of a railroad on the route hereinbefore described; and at such election a majority of the electors

voting at such election, having cast their votes in favor of such railroad aid, and the result of said election after a full and fair canvass by said Board, having been declared by said Board to be in favor of granting such railroad aid, and the sum of Two Hundred and Forty Thousand Dollars, authorized by the said vote as aforesaid to be granted in and to such railroad, being less than five per cent. of the value of the taxable property of said County, and no aid whatever to any railroad having ever been granted by said County: And a certain agreement dated January 18, A. D. 1872, between said County and the Board of Supervisors thereof and the Santa Cruz and Watsonville Railroad Company, having been fully and forever cancelled and annulled, and said County released and discharged from all liability thereunder, and covenants therein: And the said party of the second part having been heretofore duly organized as a Corporation under the laws of said State for constructing and maintaining a railroad on the entire route first hereinbefore mentioned and described, and proposing to construct on said route, first, the section of such railroad between a point at or near said Pajaro Depot, and a point on the westerly side of said San Lorenzo river, and within the corporate limits of the town of Santa Cruz, which point last referred to, is hereafter to be located by said party of the second part; and said party of the second part having solicited the said Board to grant the aid of said County in the construction of such railroad, and the terms offered by said party of the second part appearing to said Board to be advantageous to said County, and it appearing that said County will be greatly benefited by the construction of such railroad, or any part thereof: Now therefore, this Contract witnesseth, that in consideration of the premises, and of the agreements herein named, to be done and performed by said party of the second part, the said party of the first part, has agreed and hereby does agree with said party of the second part, to issue, deliver, and donate unto said party of the second part, in aid of the construction of such railroad, Bonds of the said County of Santa Cruz, in amounts, and at the times, and upon the terms as herein stated, said Bonds as herein provided, shall be payable in gold coin to said party of the second part, or to the holders of such Bonds, within twenty years from the date of their issue, at the office of the Treasurer of said County, and shall bear interest in like coin at the rate of seven per cent. per annum: and the installments of interest shall be payable semi-annually on the first Mondays of January and July of each year, on coupons to be issued and delivered with such bonds, and each of such bonds shall be of the denomination of not less than One Hundred Dollars, nor more than One Thousand Dollars, signed by the

Chairman of said Board, and by the Treasurer and Clerk of said County, and under the Seal of said County; the interest Coupons to be signed by the Treasurer and Clerk of said County; such bonds are to be prepared for signing in the following form, to wit:

Number. State of California. Dollars.

Bond of the County of Santa Cruz.

In pursuance of an Act of the Legislature of the State of California, entitled "An Act to empower the Board of Supervisors of the several counties of the State, to aid in the construction of a Railroad in their respective counties, approved April 4, 1870," and of an Act supplementary thereto, approved April 4, 1870, and in accordance with the terms of a contract entered into by the Board of Supervisors of said County, on the 4th day of August, 1873, with the Santa Cruz Railroad Company, which said contract is entered upon the minutes of the Board of Supervisors, in Vol. 3, pages 279, 280, 281, 282, 283, 284, 285, 286: The County of Santa Cruz owes and will pay at the office of the County Treasurer, in the town of Santa Cruz, State of California, to the Santa Cruz Railroad Company, or the holder of this Bond, within twenty years from the date of these presents, the sum of..... ..... Dollars, in U. S. gold coin, with interest thereon at the rate of seven per cent. per annum, in like gold coin, from the date hereof until paid, interest payable semi-annually, on the first Mondays of January and July of each year, on the surrender to said County Treasurer of the Coupon for said interest. In Testimony Whereof, and by virtue of the authority upon them conferred, by the Board of Supervisors of said County, the Chairman of the Board of Supervisors of said County, the County Treasurer and the County Clerk have hereunto set their hands, and caused the Seal of the County to be affixed, this ..... day of ....., A. D. One Thousand Eight Hundred and Seventy ...

....

Chairman Board of Supervisors.

.....

County Clerk.

....

County Treasurer.

SAMPLE COUPON.

Coupon No. On the first Monday of ....., A. D. ...., the County of Santa Craz will pay to the Santa Cruz Railroad Company, or

bearer, at the County Treasurer's Office, ... Dollars in U. S. gold coin, interest due on Bond No. ....

....

County Clerk.

....

County Treasurer.

Said Bonds, with their respective Coupons, shall be issued and delivered as follows, to wit: When five miles of said first section of said Railroad shall have been constructed, and a construction train run over the same; there shall be issued and delivered to said party of the second part, by said party of the first part, Bonds of said County, as aforesaid, to the amount of thirty thousand dollars, and upon the construction of every mile of track thereafter, of such Railroad, and the passage of a construction train over the same, there shall be issued and delivered as last aforesaid, to said party of the second part, Bonds of said County to the amount of six thousand dollars, and so on until the construction of said Railroad is completed. When said party of the second part shall have constructed the first five miles of said Railroad as herein designated, a written notice to that effect, signed by the President, Secretary or Chief Engineer of said party of the second part, shall be delivered to the County Clerk of said County, and within fifteen days after the delivery of such notice to such Clerk, the said Board of Supervisors shall inspect, or cause to be inspected, the said five miles of such road, and if found constructed in accordance with this contract, said Board shall issue and deliver to the said party of the second part the Bonds of said County, as aforesaid, to the amount of thirty thousand dollars, and thereafter as each mile of said Railroad is constructed as stipulated, a similar notice to that effect shall be delivered to said Clerk, and thereafter within fifteen days, said Board shall inspect, or cause to be inspected, such mile of the road so constructed, and if found constructed in accordance with this contract, said Board shall issue and deliver to said party of the second part the Bonds of said County as aforesaid to the amount of six thousand dollars. And in case said Board, after inspection as aforesaid, shall determine that the part of the road so inspected has not been constructed according to this contract, said Board shall, within fifteen days after such notice shall have been delivered to said Clerk, cause a written notice, signed by the Chairman of said Board, or by said County Clerk, stating the objections of said Board to the materials used in said Railroad, or to the style of the work, or to the defects in its construction, or other objections, to be delivered to the President,

Secretary or Chief Engineer of said party of the second part, or left at its office; and in default thereof, said Bonds shall be issued; but after the ninety thousand dollars of said Bonds, with their Coupons, shall have been delivered to the said party of the second part, no other or further Bond or Bonds shall be issued or delivered to the said party of the second part, until a Railroad Bridge shall have been built, constructed and finished over and across the said San Lorenzo River, on the line of said Railroad, between the County road leading to Soquel and the Bay of Monterey, and the track of such Railroad shall have been constructed, and the rails laid to within three hundred feet of the Bay of Monterey, on the westerly side of the river last named. And the said party of the second part has agreed, and hereby does agree to and with the said party of the first part, to build, construct and furnish such last named bridge, and to lay the track of said Railroad from the easterly bank of said last named river, to a point on the westerly side thereof, within three hundred feet of said Bay, in three months after said Bonds of said County, to the amount of ninety thousand dollars shall have been issued and delivered to said party of the second part. And if on the completion of the laying of the track of said first section of said Railroad, there shall be in the whole distance thereof a fractional part of a mile, said Board of Supervisors shall issue and deliver to said party of the second part, such Bonds of said County therefor, at the rate of six thousand dollars per mile. The aid of said County is granted to said party of the second part upon the following conditions, to wit:

1st. Work upon the construction of said Railroad must commence within three months from the date of this contract, and must thenceforth be prosecuted to the completion of said first section of said Railroad, with all the reasonable diligence permitted by the means at the disposal of the said party of the second part:

2d. The construction of the road-bed of said Railroad may be commenced or prosecuted or carried on at any part of the route of said Railroad, but the laying of the rails must commence on the eastern bank of said San Lorenzo River, or within one hundred yards thereof, and thence be continued on the said route of said Railroad towards the said Pajaro Depot:

3d. The said Railroad shall be of not less than a three-foot gauge, the rails used shall be of iron, and weigh on an average not less than thirty pounds to the yard, but no rail used shall weigh less than twenty-five pounds to the yard; the Railroad ties shall be of redwood; the rail joints shall be united by fish plates; the grades adopted shall be practical for the economical transportation of heavy freight; the

bridges and trestles shall be substantially built, and of approved style, and the whole work shall be first-class:

4th. The said Railroad, when the first section shall have been constructed, must be equipped with passenger and freight cars and locomotives, sufficient to accommodate the travel and trade, and the rolling stock thereof shall be an average of that used on other Railroads in the United States of the same gauge, and the road-bed shall be well ballasted:

5th. The westerly terminus of said first section of said Railroad shall be at such point on the Western side of said San Lorenzo River and within the corporate limits of the said town of Santa Cruz, as shall hereafter be selected by said party of the second part:

6th. Said Board of Supervisors shall not grant the aid authorized to be granted as aforesaid as to any part of such Railroad between said town of Santa Cruz and said Pajaro Depot, which shall not have been completed and in full operation on or before the thirty-first day of December, A. D. 1875, and no Bond shall be issued for such uncompleted portion thereof.

In Witness Whereof, the said party of the first part has caused this contract to be executed for and on behalf thereof, by the members of its Board of Supervisors, to wit: Bernard Peyton, P. F. Dean and Frank P. Porter, and its seal to be hereto affixed; and the said party of the second part has duly authorized and directed its President, F. A. Hihn, and its Secretary, J. N. Besse, for and on its behalf, to execute this contract.

SEAL.

BERNARD PEYTON, Supervisor.
FRANK F. PORTER, Supervisor.
P. F. DEAN, Supervisor.
F. A. HIHN, President of the Santa Cruz Railroad Company.
J. N. BESSE, Secretary of the Santa Cruz Railroad Company.

Immediately after the contract was executed, the Railroad Company proceeded with the construction of its road, and would have completed the first section thereof by the 31st of December, 1875, but for injunctions which restrained it from so doing until the 17th of August, 1876, at which time the portion of the road extending from the town of Santa Cruz to the Southern Pacific Railroad was completed and in actual operation.

In pursuance of the contract, the Board of Supervisors of the County of Santa Cruz issued and delivered to the Railroad Company, as its work progressed, bonds of the County to the amount of $114,000, but refused to issue or deliver any more.

The Railroad Company thereupon instituted a mandamus proceeding to compel the Board of Supervisors to issue and deliver to it the additional bonds to which it claimed it was entitled under the contract.

The Court gave judgment in favor of the Railroad Company for additional bonds to the amount of $7,862.

On appeal to the Supreme Court of the State, this judgment was affirmed; and to examine and revise that judgment the writ of error, now sought to be dismissed, was taken out.

On the trial when the contract was offered in evidence, the only objections made to it were that it was not executed under the corporate seal, and that there was a variance between the contract set out in the complaint and that offered in evidence, the particulars in which the variance consisted, not being, however, stated in the objection.

In his assignments of error, counsel for plaintiff in error assailed the contract upon the above grounds and upon the additional grounds, that it was void for want of mutuality and for want of consideration; and further, that, by its terms, it was a donation executory, and that the authority of the Board of Supervisors to issue bonds thereunder, had been terminated by the repealing Act of January, 1874.

In the answer to the complaint, it is claimed that the contract covered but one-half of the total length of road to be constructed, and that for this reason, it was such a contract as the Board had no power to enter into. The contract is set out at length in the complaint.

It hence appears from what has been stated, that the only question *raised* in the case was one of *power* in the Board to issue the bonds in view of the subsidy Statute of 1870, the

contract, and the repealing Act of January, 1874.

That this was the only question *decided* by the Supreme Court of the State in affirming the judgment, is evident from the opinion delivered by four of its justices as follows, as found reported in volume 62 of the Reports of California, at page 250.

This opinion is preceded in the Report, by the findings of fact made by the trial Court, pp. 239–250.

"We are satisfied, from the record, that the conditions precedent upon which the respondent was entitled to have the bonds issued to it, had all been performed by it, before the commencement of this proceeding, and therefore that the judgment appealed from should be affirmed. (*Nevada Bank* vs. *Steinmetz*, 10 P. C. L. J., 459.)" Judgment affirmed."

The case of *The Nevada Bank* vs. *Steinmetz*, on the authority of which the judgment was affirmed, presented the same facts as were presented in the case at bar, and both cases were in fact argued together. That case arose from the fact of the County refusing to longer pay interest on the $114,000 of bonds hereinbefore referred to as having been issued under the contract. The prevailing opinions as well as the dissenting opinion, are as follows, as found reported in 10 Pacific Coast Law Journal, at page 459:

MORRISON, C. J., delivered the opinion:

By the Act approved April 4, 1870, the Legislature authorized the several counties of this State to aid (under certain conditions and qualifications) in construction of railroads by the issue of County bonds payable within twenty years, and bearing interest not to exceed 7 per cent. per annum. The second section of the Act provides that before the granting of such aid the Board of Supervisors of the county shall submit to the qualified electors thereof the question whether such railroad aid shall be granted, and directs that a notice of the election as therein provided for shall be given. It further provides that no such aid shall be granted "unless a majority of the electors voting at such election shall cast their votes in favor of such aid." In pursuance of the provisions of the Act referred to, the Board of Supervis-

ors of the county of Santa Cruz, at a regular meeting held on the twenty-fifth day of September, 1872, passed and duly entered in its minutes the following order:

"Whereas, the Board of Supervisors of Santa Cruz County, State of California, propose that said county shall aid in the construction of a railroad of not less than a three-foot guage, and beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the County of Monterey, and running thence in a most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey, and thence along or near the coast to the boundary of said county, near the southeast corner of the Point New Year's Ranch, by the issue of county bonds, payable within twenty years, and bearing interest, payable semi-annually, at the rate of seven (7) per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding in the aggregate the sum of two hundred and forty thousand dollars, such aid to be in lieu of the aid of one hundred thousand dollars, heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad; and, whereas, the Santa Cruz and Watsonville Railroad Company have agreed that the contract entered into by said company with the said county, dated January 18, 1872, and entered on the records of said Board, in vol 3, p. 184, and following, shall be deemed canceled in case the railroad aid herein proposed shall be granted. Now, therefore, it is ordered, and notice is hereby given, that at the next general election, to be held on the fifth day of November, 1872, there shall be submitted to the electors of Santa Cruz County the question whether the Board of Supervisors of Santa Cruz County, in lieu of the aid of one hundred thousand dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad Company, at or near the town of Watsonville, and upon the cancellation of the said contract of the said county with the Santa Cruz and Watsonville Railroad Company, shall be authorized to grant, upon terms which may appear, to them advantageous to the county, the aid of the County of Santa Cruz in the construction of a railroad of not less than a three-foot guage, on the route hereinbefore described, to an amount of not exceeding in the aggregate the sum of two hundred and forty thousand dollars, in the bonds of Santa Cruz County, as proposed by said Board, to be issued at the rate of not more than six thousand dollars per mile, for every mile of main track actually constructed; all ballots cast in favor of said proposition shall

contain the words, 'Railroad Aid, Yes;' all ballots cast against said proposition shall contain the words, 'Railroad Aid, No.' Said election shall be held in all the election precincts in said county, * * * which order was published for the period of thirty days in two newspapers printed and published in the County of Santa Cruz, in accordance with such notice."

On the fifth day of November, 1872, a general election was held in the county of Santa Cruz and at such election a majority of the electors voting cast their votes in favor of granting aid to the railroad mentioned in said order, and on the eleventh day of that month the Board of Supervisors after canvassing the votes, published and declared that a majority of the electors voting at such election cast their votes in favor of granting the railroad aid mentioned in said order, and thereupon caused the proper record thereof to be entered in the "Minute Book" of its proceedings. On the fifteenth day of June, 1873, the Board of Directors of the Santa Cruz Railroad Company (the same being a corporation duly organized and existing under the laws of this State) passed a resolution authorizing the President of the company to apply to the Board of Supervisors for aid in the construction of its road at the rate of six thousand dollars per mile in county bonds, and on the fourth day of August, 1873, the Board of Supervisors of the county of Santa Cruz and the Santa Cruz Railroad Company executed the following agreement:

"This contract made and entered into on the fourth day of August, A. D. 1873, by and between the county of Santa Cruz, in the State of California, acting by and through the Board of Supervisors of said county, as the party of the first part, and that certain corporation, organized, acting and existing under and by virtue of the laws of said State, and known, designated, and called the Santa Cruz Railroad Company, as the party of the second part:

"Witnesseth, that the Board of Supervisors of said county, having, by an order duly made on September 25, 1872, and recorded at large in volume 3, pages 236-7-8 of the minutes of the proceedings of said Board, proposed that said county shall aid in the construction of a railroad of not less than a three-foot guage, the route of which road is definitely described in said proceedings as beginning at or near the Pajaro depot, on the Southern Pacific Railroad; thence running in the most practicably direct route through the counties of Monterey and Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey; and thence along or near the coast to the boundary of said county near the southeast corner of the Point New Year's

Rancho, by the issue of county bonds, payable within twenty years, and bearing interest, payable semi-annually, at the rate of seven per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding, in the aggregate, the sum of two hundred and forty thousand dollars; such aid to be in lieu of the aid of one hundred thousand dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad; and the Board of Supervisors of said county, under and in pursuance of an Act of the Legislature of said State, approved April 4, 1870, and entitled, 'An Act to empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties,' and of the Act of April 4, A. D. 1870, supplemental thereto, having, at the election held in said county on the fifth day of November, A. D, 1872, of which election at least thirty days' notice was given by publication once a week in a newspaper printed and published in said county, which notice stated the day on which, and the places where, such election was to be held in said county, and the amount of bonds of said county to be issued for railroad aid, and definitely described the route of the railroad for which aid was proposed, submitted to the qualified electors of said county the question whether such railroad aid shall be granted by said county to aid in the construction of a railroad on the route hereinbefore described; and at such election a majority of the electors voting at such election having cast their votes in favor of such railroad aid, and the result of said election, after a full and fair canvass by said Board, having been declared by said Board to be in favor of granting such railroad aid, and the sum of two hundred and forty thousand dollars, authorized by the said votes as aforesaid, to be granted in and to such railroad, being less than five per cent. of the value of the taxable property of said county, and no aid whatever to any railroad ever having been granted by said county. And a certain agreement dated January 18, A. D. 1872, between said county and the Board of Supervisors thereof, and the Santa Cruz and Watsonville Railroad Company, having been fully and forever canceled and annulled, and said county released and discharged from all liability thereunder, and covenants therein. And the said party of the second part having been heretofore duly organized as a corporation under the laws of said State for constructing and maintaining a railroad on the entire route first hereinbefore mentioned and described, and proposing to construct on said route, first, the section of such railroad between a point at or near said Pajaro depot and a point on the westerly side of said San Lorenzo river, and within the corporate limits of the town

of Santa Cruz, which point last referred to is hereafter to be located by said party of the second part; and said party of the second part having solicited the said Board to grant the aid of said county in the construction of such railroad, and the terms offered by said party of the second part appearing to said Board to be advantageous to said county, and it appearing that said county will be greatly benefited by the construction of such railroad, or any part thereof; now, therefore, this contract witnesseth, that in consideration of the premises and of the agreements herein named, to be done and performed by said party of the second part, the said party of the first part has agreed, and hereby does agree with said party of the second part, to issue, deliver and donate unto said party of the second part, in aid of the construction of such railroad, bonds of the said county of Santa Cruz, in amounts and at the times, and upon the terms as herein stated; said bonds, as herein provided, shall be payable in gold coin to said party of the second part and to the holders of such bonds within twenty years from the date of their issue, at the office of the Treasurer of said county, and shall bear interest in like coin at the rate of seven per cent. per annum, and the installments of interest shall be payable semi-annually on the first Mondays of January and July of each year, on coupons to be issued and delivered with such bonds, and each of such bonds shall be of the denomination of not less than $100 and not more than $1,000, signed by the Chairman of said Board and by the Treasurer and Clerk of said county and under the seal of said county, the interest coupons to be signed by the Treasurer and Clerk of said county. Such bonds are prepared for signing in the following form, to wit: Number ——. State of California. —— Dollars. Bond of the county of Santa Cruz," etc., etc.

The contract further provides that when five miles of the road are completed and a construction train has been run over the same, there shall be issued to the company bonds of the county to the amount of $30,000, and upon the construction of every mile of the track thereafter and the passage of a construction train over the same, there shall be issued to the railroad company bonds of the county to the amount of $6,000. The contract then proceedes to provide for a notice to be given of the construction of the road as it progressed, for an examination and inspection of the same, for an acceptance thereof by the county, and for the issue of bonds as the road was built, at the rate of $6,000 per mile. There are numerous other clauses in the contract which it is unnecessary to notice for the purposes of this opinion.

It appears from the evidence in the case that the railroad company commenced work on the first section of its road and prosecuted the

work thereon with reasonable diligence until the same was completed from the city of Santa Cruz to the Pajaro depot; that the company built a bridge over and across the San Lorenzo river; that the road was constructed in the manner provided for and in accordance with the contract; that a construction train was run over the road; that it was inspected by the Board of Supervisors; that it was duly accepted, and the Board of Supervisors, on the ninth day of December, 1874, ordered that $30,000 of the bonds of the county be issued to the company.

It further appears that on or about the eleventh day of December, 1874, a suit was commenced by one William H. Patterson, in the District Court of the Twentieth Judicial District, against the Board of Supervisors of the county of Santa Cruz, praying for an injunction to restrain and enjoin the defendants from issuing to the railroad company any bonds on account of the construction of said road, and thereupon an injunction was issued in pursuance of the prayer of the complaint. The case of *Patterson* vs. *The Supervisors* was afterwards tried upon its merits, and on the twenty-third day of February, 1876, a decree was entered therein declaring that the proceedings of the Board were legal and valid; that the issuance of the bonds should not be in any manner restrained or enjoined, and thereupon the injunction previously issued was dissolved.

After the judgment of the Twentieth District Court dissolving the injunction referred to above, that is to say, on or about the twenty-fifth day of February, 1876, the Board of Supervisors of Santa Cruz County issued and delivered to the Santa Cruz Railroad Company $30,000 of bonds, each of which was in the following form:

"In pursuance of an Act of the Legislature of the State of California, entitled 'An Act to empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties,' approved April 4, 1870, and of an Act supplemental thereto, approved April 4, 1870, and in accordance with the terms of a contract entered into by the Board of Supervisors of said county on the fourth of August, 1873, with the Santa Cruz Railroad Company, which said contract is entered upon the minutes of the Board of Supervisors in volume 3, pages 279, 280, 281, 282, 283, 284, 285, 286:

"The County of Santa Cruz owes and will pay at the office of the County Treasurer in the town of Santa Cruz, State of California, to the Santa Cruz Railroad Company, or the holder of this bond, within twenty years from the date of these presents, the sum of one thousand dollars in U. S. gold coin, with interest thereon at the rate of seven

per cent. per annum in like gold coin, from the date hereof until paid; interest payable semi-annually on the first Mondays of January and July of each year, on the surrender to said County Treasurer of the coupon for said interest."

The coupon attached to each of the bonds is in the following form: "Coupon No. 41. On the 23d of February, A. D. 1896, the county of Santa Cruz will pay to the Santa Cruz Railroad Company, or bearer at the County Treasurer's office, ten and twenty-one one hundredths dollars in U. S. gold coid, interest due on Bond No. 1."

On the twentieth day of March, 1875, and at divers times between that date and the fifteenth day of November of that year, the Santa Cruz Railroad Company presented and filed with the Board of Supervisors written notices and communications informing them of the completion of fourteen additional miles of the road, and thereupon proceedings were regularly taken by the Board to inspect and examine the same, and after such examination and inspection, the following order was passed:

"It is therefore ordered by the Board of Supervisors of the county of Santa Cruz, that there be issued and delivered to the Santa Cruz Railroad Company, bonds of said county of Santa Cruz, to the amount of eighty-four thousand dollars, in sums of one thousand dollars each, payable within twenty years of their date in United States gold coin, and bearing interest in like coin, at the rate of seven per cent, per annum from their date, and interest payable semi-annually on the first Mondays of January and July of each year, in pursuance of the terms of said contract between the county of Santa Cruz and the Santa Cruz Railroad Company, and that said bonds be signed by the chairman of this Board and by the County Treasurer and County Clerk, and under the seal of said county, and the interest coupons to be signed by said Treasurer and said Clerk.

"It is further ordered, that each of the bonds issued to the said railroad company under said contract, shall be of the denomination of one thousand dollars."

In pursuance of the above order bonds were issued to the Santa Cruz Railroad Company to the amount of $84,000. These bonds were in form similar to the bonds for $30,000 previously issued to the railroad company.

All of these bonds were, within three months from the issuance thereof, sold and disposed of by the railroad company, and on the second day of August, 1879, they were purchased and paid for by the plaintiff, the Nevada Bank of San Francisco, in the ordinary course of

business, at the rate of ninety-five cents on the dollar, and were purchased under the belief that the same were legal and valid.

On the third day of January, 1881, the coupons on the bonds which fell due on the first of that month were presented to the defendant, the Treasurer of the county of Santa Cruz, and payment thereof was demanded, which was refused by the defendant although he at the time had sufficient funds on hand specially provided by law for that purpose, to pay said coupons; and this is an application to the Court for a peremptory writ of mandamus to compel the defendant as Treasurer of said county to pay such coupons.

There are other facts presented by the pleadings and report of the referee to whom this case was referred for the purpose of taking and reporting the facts therein, but we deem it unnecessary to consider them.

The question presented for our decision is simply this: Are the bonds in the hands of the plaintiff, claiming the same as a *bona fide* purchaser for value, valid and binding upon the county of Santa Cruz!

The Act of April 4, 1870, as appears from its title, as well as from its clearly expressed object, was intended to "empower the Board of Supervisors of the several counties of the State to aid in the construction of a railroad in their respective counties," and the only restrictions imposed upon the Board were that the bonds to be issued for such aid should not exceed five per cent. of the value of the taxable property of the county; and further, that the question of granting such aid should be submitted to the qualified electors of the county, in pursuance of Section 2 of the Act. The question of granting such aid was submitted to the voters of the county of Santa Cruz, and the proposition was for a road "beginning at or near Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river, near Watsonville, between the county road leading to Soquel and the bay of Monterey, and thence running along or near the coast to the boundary of said county, near the southeast corner of Point New Year's Ranch," and the order was.

"Now, therefore, it is ordered and notice is hereby given, that at the next general election to be held, etc., there shall be submitted to the people the question whether the Board of Supervisors shall b authorized to grant, upon terms which may appear to them to be advantageous to the county, the aid of the county of Santa Cruz, as follows: When five miles of said first section of said railroad shall bave been constructed, and a construction train run over the same, there shall

be issued and delivered to said party of the second part by the said party of the first part, bonds of said county to the amount of $30,000, and upon the construction of every mile of track thereafter of such railroad, and the passage of a construction train over the same, there shall be issued and delivered as last aforesaid, to the said party of the second part, bonds of said county to the amount of $6,000, and so on until the construction of said railroad is completed;" and it was provided in the proposition submitted to, and adopted by the vote of the people, that bonds should be issued at the rate of not more than $6,000 *for every mile of main track actually constructed.* It is claimed on behalf of defendant, first, that the contract was an unilatral one, and therefore not binding upon the county; second, that the Board of Supervisors had no power to enter into a contract for the construction of a railroad which did not extend over the entire route, from Pajaro depot on the south to Point New Year's Ranch on the north: and third, that the Act of 1879 was repealed before the bonds were issued.

If the contract did not contain any stipulation on the part of the railroad company to build the road or to do any other act, we can see no good reason why the party of the first part should not be bound by its promise or agreement, provided the railroad company, acting upon such promise or agreement, proceeded to construct the road in accordance with the conditions set forth in the contract. It may be that the county could have withdrawn its promise of aid at any time before work was done on the faith of the promise; but after the work was done and the contract was executed, the county could not escape from its liability on the ground that the company did not, in the first instance, obligate itself to construct the road. If A promise B to pay him a stipulated sum for a certain service, and B renders the service without any contemporaneous promise to do so, can it be doubted that A will be bound by his promise? The following authorities are referred to in support of the point that the contract was binding on the county after performance by the Company, *even if it was unilateral: Barnes* vs. *Perine*, 3 Barb. 211; *Robertson* vs. *Marsh*, 3 Scam. 198; Chitty on Contracts, 64; *Train* vs. *Gold*, 5 Pick. 879; *White* vs. *Baxter*, 71 N. Y. 254.

But is it true that the railroad company did not agree or promise to do anything on its part? The contract contains the following agreement or promise by the company: "And the said party of the second part (the company) has agreed and hereby does agree to and with the said party of the first part to build, construct and finish such last-named bridge (across the San Lorenzo river), and to lay the track of

said railroad from the easterly bank of said last-named river to a point on the westerly side thereof, within three hundred feet of said bay, in three months after said bonds of said county, to the amount of $90,000, shall have been issued and delivered to said party of the second part." There is also a clause in the contract to the effect that the aid is granted in lieu of a former aid of $100,000, which is surrendered and cancelled by the express terms of the contract. Here we find a sufficient consideration, if any were necessary, for the promise on the part of the county.

The second point made on behalf of the defendant involves an attack upon the contract, on the ground that the Board of Supervisors had no power to make it, because it did not provide for, and the Santa Cruz Railroad Company was not bound under it to construct the road *along the entire route.*

In this connection it is proper to notice the fact that the Act of April 4, 1870, does not provide for a contract between the county and the railroad company, but simply empowers the county to aid in the construction of a railroad upon certain terms. The aid authorized by the law, and intened by the parties, was to be granted as the work progressed, in order to assist and enable the company to pay for the work and construct the road, and it never was contemplated that the entire work should be completed and paid for by the company before the bonds should be issued. (*Kennicott* vs. *Supvrs.*, 16 Wall. 466.) This would not be aiding the company in the construction of the road, but would be simply reimbursing the company, in whole or in part, its money expended in building the road. This view is fortified by the proposition submitted to the electors, which was that the county should aid the railroad company in the construction of its road by issuing and delivering to it bonds *"at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed,"* the bonds should have been issued for every mile when constructed (after the completion of the first five miles), and it is fair to presume that they would have been so issued if the board had not been enjoined by the order of the Twentieth District Court.

The Bank of Nevada purchased the bonds for value, without notice of any infirmity in them, and the only question is one of *power* in the Board to issue them. (*Cromwell* vs. *The County of Sac.*, 96 U. S. 51; 1 Dillon Mun. Corp., Sec. 515, and authorities there cited.) If the Board did not have the *power* to issue the bonds there could be no such thing as a *bona fide* holder of them, as any purchaser would be held to have notice of the fact that there was a total want of authority." (*Township of East Oakland* vs. *Skinner*, 94 U. S. 258.) "The

following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper." (1 Dillon on Mun. Corp., Sec. 113, and authorities there cited.) Speaking further on this subject the same auther says: "The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation." (Id. 513.) "It" (the Supreme Court of the United States) "has adopted, when necessary to protect the *bona fide* holders of such securities, liberal construction of statutes and charters authorizing the creation of such debts. Against such holders it has given no favor to defenses based upon mere irregularities in the issue of the bonds or non-compliance with preliminary requirements, not going to the question of power to issue them." (Id. 515.)

It is claimed in the case now under consideration that there was a want of power on the part of the Board of Supervisors to make any contract or to issue any bonds for a portion of the road; and that is the only ground upon which the question of power can arise. There is no charge of fraud or unfair dealing on the part of the Board, and the most that can be said against its action is that it provided in the first place for the construction of that section of the road lying between the city of Santa Cruz and the Pajaro depot. In this we can see no just cause of objection or complaint, for that was the most important section of the road; and its completion brought a large portion of the county of Santa Cruz into direct communication with the Southern Pacific road, and thereby opened a lengthy line of travel north and south with other portions of the State.

It does not appear that there was not an intention on the part of the Board of Supervisors to extend the road in a northerly direction from Santa Cruz to its northerly terminus; and after appropriating one-half of the $240,000 of the bonds of the first section of the road—about one-half of the entire route—there remained to be issued a corresponding amount of bonds to aid in the construction of the other half of the railroad.

It remains only for us to say that in our opinion the bonds were not issued without power; that they were valid when issued, and are good and binding upon the county in the hands of the plaintiff.

There is but one other question to be determined, and that relates

to the effect of the Act of January 14, 1874, repealing the Act of April 4, 1870. This question has been passed upon in several cases. It is found in the report of the referee that the Santa Cruz Railroad Company commenced work on its road, under the contract between it and the county, on the 25th day of October, 1873, and prosecuted the same with reasonable diligence; but the repealing Act was not passed until January 14, 1874. In view of the facts of this case the validity of the bonds was not affected by the repeal of the Act of April 4, 1870. (*Town of Concord* vs. *Savings Bank*, 92 U. S. 630; *Steamship Company* vs. *Joliffe*, 2 Wallace, 450; *Montgomery* vs. *Casson*, 16 Cal. 189.)

Let the writ issue.

CONCURRING OPINIONS.

The only objection to the validity of the bonds which seems to us to merit any serious consideration is, that after a majority of the electors voting upon the proposition to issue bonds to aid in the construction of a railroad upon a certain specified route, between two certain specified points, had voted in favor of granting such aid, the Board of Supervisors entered into an agreement whereby said Board agreed to issue bonds to the amount of six thousand dollars per mile for the construction of a railroad on said route for a distance less than the entire distance between the termini mentioned in the proposition submitted to said electors. And that objection is founded upon the hypothesis that it was the understanding of the electors who voted upon the proposition that in consideration of the aid granted the entire road should be constructed.

There is but one way at which we can arrive at the intention of the electors who voted upon the proposition to grant aid, and that is by an inspection of the proposition itself.

The proposition voted upon, as stated in the notice of the election, was substantially as follows: That the Board of Supervisors should be authorized to grant (in lieu of the aid of one hundred thousand dollars, previously authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad) *upon terms which might appear to said Board advantageous to said county*, "in the construction of a railroad *on the route*" described as "beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey,

and thence along or near the coast to the boundary of said county, near the southeast corner of the Point New Year's Ranch," * * "to an amount of not exceeding in the aggregate the sum of two hundred and forty thousand dollars, in the bonds of Santa Cruz County, as proposed by said Board, to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed."

The vote was in favor of aiding in the construction of a railroad on a route "beginning at or near Pajaro depot," and "ending at the boundary of said county, near the southeast corner of the Point New Year's Ranch." And the Board of Supervisors were authorized "to grant upon terms which to them" might "appear advantageous to the county" the aid of the county in the construction of a railroad on that route, in the bonds of the county, "to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed," until the aggregate of the bonds so issued should amount to $240,000.

Now it is not claimed that so much of the road as has been actually constructed was not constructed on the route designated in the proposition which was submitted to the electors of the county. But it is claimed that the Board of Supervisors was not authorized to agree to issue bonds at the rate of six thousand dollars per mile for any number of miles less than the whole number between the terminal point of the route. The Board, however, was expressly authorized to grant said aid upon terms which might appear to it to be advantageous to the county, and if it appeared to it to be advantageous to the county to aid in the construction of nineteen miles, and no more, of the road constructed on the route designated, it is not the province of this Court to review the decision of the Board upon that question. We are bound to assume that it appeared to the Board to be advantageous to the county to have no more than nineteen miles of that road constructed, at an expense of six thousand dollars per mile to the county, until we are convinced that it appeared otherwise to said Board.

The Board was not bound to issue bonds at the rate of six thousand dollars per mile for every mile of railroad which might be constructed between terminal points mentioned in the propositions to grant aid. But it was authorized to issue them at the rate of six thousand dollars per mile for every mile of main track actually constructed. And whether it issued them at the rate of six thousand dollars per mile for a part of the distance or for the entire distance, it was issuing them in aid of the construction of a railroad on the route designated in the proposition upon which the electors had voted. By aiding in the con-

struction of nineteen miles of railroad on the route designated, the county was aiding *pro tanto* in the construction of it from one to the other of the terminal points mentioned in said proposition. If it was the intention of the electors voting upon the proposition to grant the aid of the county in the construction of a railroad upon the route specified, that said aid should not be granted except upon the condition that a railroad should be constructed the entire length of the route, it must be admitted, we think, that they have failed to express that intention. And if they have, it is no part of the duty of this Court to supply the omission. It is our duty to construe the contract which the parties have made—not to make one for them.

The construction which we have put upon the vote of a majority of the electors who voted upon the proposition to issue bonds in aid of the construction of said railroad is in accord with that which the Board of Supervisors practically put upon that vote; and the people of said county acquiesced in that construction for a considerable period of time, by offering no resistance to the issuing of the bonds, and by paying the interest upon them semi-annually for a period of more than four years, three of which preceded the purchase of said bonds by the petitioner herein. It is not necessary to invoke the doctrine of "municipal decision," or of estoppel, of which it is one of the forms, to the extent that it has been applied by the Supreme Court of the United States in cases involving the validity of municipal bonds, in order to sustain the validity of these bonds. In a late treatise on Public Securities the author says: "It has often happened in the cases which have come before the Supreme Court of the United States that the municipalities which sought to evade the force of the bonds issued on their behalf had received the proceeds of the bonds, enjoyed the benefits of the improvements made by them, paid the interest for many years, and these circumstances as well as the doctrine of municipal decision, have influenced the Court in their determinations." And then adds: "It is not, however, against these decisions, when these different elements are combined, that we make our protest." (Burroughs on Public Securities, p. 341.) In addition to those enumerated in the above extract, there is in this case another very important element, and that is that it was made a condition precedent to the issuing of any bonds to aid in the construction of said railroad, that a certain contract by which said county had agreed with the Santa Cruz and Watsonville Railroad Company to aid it to the extent of one hundred thousand dollars "in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad, at or near the

town of Watsonville," should be canceled; and it appears by a recital in the agreement between the Board of Supervisors and the Santa Cruz Railroad Company, that said contract with the Santa Cruz and Watsonville Railroad Company was "fully and forever canceled and annulled, and said county released and discharged from all liability thereunder, and covenants therein." That liability amounted to within $14,000 of the whole amount of the bonds held by the petitioner. And it is not even suggested that the liability so canceled can be restored so as to place the parties in the same condition that they were in prior to its cancellation. Does not that present a case for the application of the principle of estoppel?

If that principle can be applied to a municipality, it is difficult to conceive of a case to which it could be applied more properly than to the one at bar. Here a majority of the electors voted in favor of a proposition which will at least admit of the construction which all of the parties interested in it practically put upon it for a period of four or five years by issuing the bonds and paying interest thereon, and now, after said bonds, which are negotiable, have passed through several hands, this Court is asked to hold that such construction was erroneous, and that the petitioner, who paid their full market value, should have made that discovery before purchasing them, although it does not appear that any tax-payer, Supervisor, Treasurer, or legal advisor of the county made it until some time afterward.

That which it is now claimed constituted a condition precedent to the power to issue the bonds is certainly not clearly expressed in the proposition submitted to the electors, and for which a majority of them voted, and it seems to us inexplicable that if such a condition had been supposed to exist, the Board of Supervisors should have been permitted to issue the bonds in utter disregard of it, when any tax-payer in behalf of himself and all other tax-payers of the county, could have intervened and prevented the issue of them. And it is still more inexplicable to us that under such circumstances the interest on the bonds should have been paid for a period of four or five years without a word of protest from any tax-payer, so far as we are advised. "They had opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin the proceeding and protect themselves; they did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons, who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too

late for them to do so as against innocent third persons. They are concluded not simply by the acts of their public agents but their own." (*State* vs. *Van Horne*, 7 Ohio St. 327.)

If the construction of the power conferred upon the Board of Supervisors, for whom the respondent contends was clearly the correct one, we might be compelled to hold that the petitioner was chargeable with notice of the want of authority in the Board of Supervisors to enter into the agreement which they entered into with the railroad company. But it is by no means clear that that construction is the correct one, and it is clear that during a period of four or five years all parties interested acted as if it was not the correct one, and we think that in a case like this, that circumstance is entitled to great weight.

SHARPSTEIN, J.

I concur: McKinstry, J.

I concur upon the second ground discussed in the opinion of Mr. Justice Sharpstein and for the reasons by him given. Ross, J.

DISSENTING OPINION.

Under the Act of April 4, 1870 (Stats. 1869–70, p. 746,) a vote was had, authorizing the granting of aid, and a contract had been made between the Board of Supervisors of Santa Cruz and the Santa Cruz and Watsonville Railroad Company, by which aid to the amount of $100,000 was granted to that company to assist in the construction of a railroad from the town of Watsonville to the town of Santa Cruz. For some reason the work did not progress. On the twenty-fifth of September, 1872, the Board of Supervisors made an order for an election, to be held upon the proposition of granting aid for the construction of a railroad from a point on the line of the Southern Pacific Railroad, at or near the Pajaro depot, thence through the county of Santa Cruz to the northern line of the county, near Point New Year's Ranch; said aid to be $6,000 per mile, and not exceeding the aggregate of $240,000, interest bearing bonds of the county to be issued therefor; said aid to be in lieu of the aid of $100,000 theretofere authorized to be granted. In pursuance of this order an election was held, and the result was in favor of the proposition.

Thereafter, on the fifteenth of June, 1873, the Santa Cruz Railroad Company made its application for aid. On the eighteenth of June, 1873, the articles of incorporation of the Santa Cruz Railroad Company were filed, such incorporation being for the purpose of constructing, conducting and maintaining an iron railroad within the counties of Monterey and Santa Cruz, commencing at a point at or near Pajaro Station,

on the Southern Pacific Railroad, in the county of Monterey, and running thence to and through the county of San Cruz to the northern boundary of Santa Cruz County at or near the south boundary of the Rancho Point Año Nuevo (Point New Year's Ranch,) the estimated length of said railroad being forty miles. On the fourth of August, 1873, the Board of Supervisors received from the Santa Cruz and Watsonville Railroad Company a release of the $100,000 aid, and on the same day executed a contract with the Santa Cruz Railroad Company, in which was recited the before-mentioned proposition for aid in the construction of a railroad beginning at or near the Pajaro depot, and thence running in the most practicable direct route through the counties of Monterey and Santa Cruz, to the boundary of Santa Cruz County, near the southeast corner of Point New Year's Rancho, by the issuance of bonds, the same to be in lieu of the $100,000 before authorized; the submission of the proposition to the voters of the county; the election and the vote in favor of the aid; the release of the $100,000 aid; the incorporation of the Santa Cruz Railroad Company for the purpose of constructing and maintaining a railroad on the entire route, and the solicitation of the company for aid in the construction of such railroad. The contract then proceeded to declare that the county would be greatly benefited by the construction of said railroad *or any part thereof*, and provided for the issuance of bonds at the rate of $6,000 per mile as the road should be completed in sections specified; but provided that the western terminus of the work to be done thereunder should be at a point within the corporate limits of the town of Santa Cruz. The company was authorized to commence its work at a point near the town of Santa Cruz, and prosecute the same easterly to Pajaro Station. It should be noticed that the town of Santa Cruz is about midway between the two ends of the road, as stated in the proposition submitted to the voters. No provision was made in this contract for the construction of a road beyond Santa Cruz, nor was any reference made thereto, except by the recitals above stated; on the contrary, it is perfectly evident from the contract that the Board of Supervisors on the one hand, and the railroad company on the other, intended that the same should apply only to that portion of the route as should be between Pajaro and Santa Cruz. The work of construction so progressed that on the seventh of December, 1874, the Board of Supervisors made an order for the issuance of bonds to the amount of $30,000. At this point one Patterson brought a suit against the Board of Supervisors for the purpose of restraining the issuance of the bonds; and such proceedings were had that on the

twenty-third of February, 1875, judgment of non-suit was entered, upon the ground that the plaintiff had failed to prove a sufficient case.

Thereafter, in 1876, the road having been constructed from Pajaro to Santa Cruz, bonds were issued to the Santa Cruz Railroad Company—$30,000 on the twenty-fifth of February, and $84,000 on the eleventh of March. The bonds on their face refer to the Act of 1870, and recite, "and in accordance with the terms of a contract entered into by the Board of Supervisors of said county on the fourth day of August, 1876, with the Santa Cruz R. R. Co., which said contract is entered upon the minutes of the Board of Supervisors in Vol. 3, pages 279, 280, 281, 282, 283, 284, 285, 286." On the seventh of August, 1879, the plaintiff purchased the bonds through a broker, having no knowledge of the then holder, paying therefor 95 per cent. of the par value.

No road has been constructed over any part of the projected route between the town of Santa Cruz and the northern boundary line of the county, nor has such construction been or attempted to be provided for.

The proceeding is a petition for a writ of mandate requiring the respondent as County Treasurer to pay the coupons on the bonds held by petitioner. The petitioner claims as well that the bonds were properly issued, and are a legal charge upon the county, as that it being a *bona fide* holder for value, payment cannot be disputed.

In our opinion, the question of the rights of *bona fide* holders of bonds does not arise and is not for consideration in this case. The bonds on their face refer to the statute authorizing the granting of county aid, and to the contract between the Board of Supervisors and the railroad company. Therefore, the bonds are as though the statute and the contract were written, word for word, therein. The statute authorized the granting of county aid; the election was held thereunder, and the matter submitted was: Shall aid be granted for the construction of a railroad from Pajaro to the northern line of the county? Upon that question, *and that question only*, the people voted to grant the aid; for that purpose, and for that purpose only, the Board of Supervisors were authorized to issue bonds, there were *no vote* upon the granting of aid for any less distance; the contract was for "one section" only—from Pajaro to Santa Cruz—about one half the entire distance voted upon. It cannot be pretended that it is or has been the intention of the railroad company to complete the road. It is manifest that it was the intention of the parties who conducted the transaction on the part of the Board of Supervisors and the railroad company to take

advantage of a vote which had been had for granting aid for the construction of the road for the whole distance, construct the road for only half of the distance, obtain the issuance of bonds for that half, at the rate of $6,000 per mile ($120,000 for the twenty miles—that probably being the only profitable part to build or operate)—and then omit to proceed with the further construction. The contract, which, by being referred to, is a part of each and every bond, refers, also, to the vote of the people in favor of aid for the road the *entire distance*—and then, after so referring, assumes to authorize the railroad company to construct but the part, the track-laying to commence at Santa Cruz and extend to Pajaro; no word is written, or act provided for, having in view any other or further construction. Such transactions are not fair dealing; and of such, in this case, holders of the bonds are bound to take notice. It is a question of *power*. The Board of Supervisors had no power to issue bonds to aid in the construction of any quantity or distance of road less that the whole. It acted under a limited and special power of attorney. Possibly bonds might have been issued for miles as the work progressed, but the holders of such bonds would be under the burden of providing for or requiring the entire construction. The Supreme Court of the United States, in *Township of East Oakland* vs. *Skinner*, (4 Otto, 258,) says: "We have held that there can be no *bona fide* holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authority in an authorized agent. Where there is a total want of authority to issue the bonds there can be no such thing as a *bona fide* holding."

As was said above, although there was power to issue bonds in a certain case, viz., for the construction of the entire distance, yet *there was no power* to issue in aid of the construction of a less distance. That it was the intent of the railroad company to build, and of the Board of Supervisors to have build, a part only, is clearly manifest from the proceedings. The Board declared (see contract between the Board and the railroad company): "It appearing that said county will be greatly benefited by the construction of said railroad *or any part thereof*." The Board had not power to declare any benefit from a part. The people had, by their votes, declared the extent of the line of the road, and the Board had no more power to diminish its length than to increase the amount of aid. The intent to avoid compliance with the law is apparent upon the face of the documents re-

ferred to in the bonds; and the purchaser was bound to take notice. The bonds were not like a bill of exchange or promissory note, "a courier without luggage"—but these transactions were tied to them, and could not be shaken off.

The Supreme Court of the United States in *School District* vs. *Insurance Co.* (13 Otto, 710,) said: "As the bonds recite that they were issued under this Act [an Act which the Court held not to give authority for issuing the bonds in question], and the vote was taken under it, we cannot see that power purposed to be exercised under other and very different circumstances, can be invoked to give validity to an Act which is void by the authority under which it professed to be acting."

It has been repeatedly urged that the holders of bonds have innocently invested their money, and should, as innocent holders of public securities, be protected. They are not, however, the only persons to be considered. Tax-payers are equally innocent; tax-payers are not to be subjected to extraordinary burdens, or even ordinary burdens, except by law.

To this case may be applied the language used by Justice Field, concurred in by Chief Justice Waite and Justices Grier and Miller, in dissenting from the judgment of the Court in *Rogers* vs. *Burlington*, 3 Wall. (U. S.) 668: "In all such cases the mode becomes the measure of the power. * * * This is not a case where the doctrine of estoppel has any application. It is not a case where the purchaser of the bonds was misled by any recitals of conformity to law. Here the statute and the ordinance of the city of Burlington, under which authority to issue the bonds was assumed to exist, are both printed in full in the indorsements upon the bonds; and the ordinance is also referred to on their face. But if this were not so, the case would not be changed, as the statute did not authrize the issue of the bonds. No formality of execution, and no extent of recitals, could give validity to instruments thus issued."

There are even stronger objections against the validity of the bonds involved in the case at bar than those considered in the case above referred to.

The length of time which elapsed after the making of the contract and the issuance of the bonds, before the purchase by petitioner, may not be a controlling consideration, but it is certainly significant in one respect. The contract was made August 4, 1873, and the bonds were issued in February and March, 1876; the petitioner did not purchase until about three years and a half thereafter, to wit, August 7, 1879. During all that period no step had been taken by the railroad com-

pany or the Board of Supervisors for carrying out the will of the people as expressed in granting the aid.

The petitioner is not in a position to say it was not fully advised of all the proceedings. While it had the proposed purchase of the bonds under consideration, it caused to be examined the Act of April 4, 1870, the popular vote upon the question of extending the aid, the contract between the Board of Supervisors and the Santa Cruz Railroad Company, and it had the bonds before it. It also caused to be examined an action then pending by the railroad company against the Board of Supervisors for the further issuance of bonds, which action was being resisted upon the ground, among others, that no vote had been had for the granting of aid for any less distance than the whole.

The writ should be denied. MYRICK, J.

We concur: McKee, J., Thornton, J.

ARGUMENT.

From the above, it is plain that no *federal question* was either *raised or decided* in the case at bar. The sole question in the case was one of *power under a statute of the State*. It nowhere appears upon the record that any claim was made that this statute was in conflict with any provision of the federal constitution, nor was it necessary that the Court should pass upon any such question, in order to reach a decision in the case.

The contention of plaintiff in error was, that the Board had no power to enter into *any* contract at all under the Statute, but in any event not such a contract as that sued on; and that, independently of this, the Statute having been repealed before any bonds were issued under the contract, none could thereafter be issued. The *validity of the statute* was not assailed at any stage of the case; but only the proceedings *under the Statute*. It is hence perfectly obvious that the case cannot by any ingenuity, be brought within the rule as laid down and enforced by this Court in a multitude of cases, and which requires, that "in order to give the Court jurisdiction, the record must show that the point was brought to the

attention of the State Court and decided by it. It is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the State law was drawn in question and the judgment founded upon its validity."

The Grand & C. R. R. Co. vs. *Marshall*, 12 How. 167.

"And the ground of jurisdiction must be stated with precision, and the ruling of the Court to bring the case under the 25th Section must appear, on the record, to have been against the right claimed."

Heirs of Poydras vs. *Treasurer*, 18 How. 196.

Further, "it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause;" and if no federal question has been specially raised by the pleadings, and the record shows clearly on its face that the decision of such a question was not necessarily involved, this Court will not go through the *opinion of the Court* even, to ascertain whether one was in fact decided.

Citizens' Bank vs. *Board*, 8 Otto, 141–142.

Moore vs. *Mississippi*, 21 Wall. 639.

"It must appear that the point mentioned in the Judiciary Act was *actually* decided in the State Court; that it received the attention of the Court: and it is not sufficient, that now, on fuller examination, with the aid of counsel here," "the Court can see that it was a point which ought to have been raised and which might have been decided."

The Victory, 6 Wall. 384.

See also the following, which are peculiarly pertinent to the facts of the case at bar:

Porter vs Foley, 24 How. 415–420.
Salmons vs Graham, 15 Wall. 208–210.

It would be matter of easy demonstration to show that the case presents no federal question which *could have been* raised or decided; but this is unnecessary, for the rule is inflexible that it is of the *essence* of the jurisdiction that such question must have been set up in the State Court.

Worthy vs Commissioners, 9 Wall. 613.

It being thus perfectly apparent that the Court has no jurisdiction, we respectfully ask that the writ of error be dismissed.

The cause is numbered 1137 on the docket for the present term and will not perhaps be reached for several years. We submit, therefore, that the hardship of such long delay ought not to be entailed upon us, when the record discloses such manifest want of jurisdiction.

EDWARD R. TAYLOR,
Counsel for Defendant in Error.